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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1930

No. 282

BONWIT TELLER & COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 9, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,204)

(35,204)

SUPREME COURT OF THE UNITED STATES

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1930

[fol. 1]

IN SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 282

BONWIT TELLER & COMPANY, Petitioner,

against

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Bonwit Teller & Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The question involved is whether, in an action to recover an overpayment of tax, claim, for which was duly allowed by the Commissioner of Internal Revenue and evidenced by his certificate to that effect, the action of the Commissioner in allowing the claim is binding upon the United States where neither fraud nor mistake is asserted.

The petitioner's income tax return for the fiscal year ended January 31, 1919 was filed on or about the 14th day of July 1919 (Special finding 3). Thereafter upon audit [fol. 2] of the return the Commissioner found and so advised the taxpayer under date of November 19, 1924, that its tax had been overassessed in the sum of $10,866.43 (Special finding 4). The period of limitation then in effect had run against the allowance of a refund, but the statute was subsequently amended (Act of March 3, 1925; 43 Stat. 1115) so as to permit such allowance.

In accordance with that amending act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver is

filed on or before June 15th, 1925." Thereupon, on May 22, 1925, the taxpayer filed the required waiver, with a letter saying, "In accordance with your request, we enclose you herewith waiver." (Special finding 5). Still later, on February 9, 1927, the Commissioner again wrote taxpayer in respect to the matter, requesting a formal claim executed on the departmental Form 843. This form duly executed was filed on or about February 19, 1927 (Special findings 6-8). The Commissioner treated the waiver and letter of May 22, 1925, in connection with the prior correspondence and proceedings, as an informal or defective claim for refund, perfected by the formal claim on Form 843, and allowed the claim in the amount of $10,866.43. (Special findings 9-10). On or about March 8th, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in petitioner's favor, and on or about May 12, 1927 caused the original certificate to be delivered to the petitioner (Special finding 11). A copy of that certificate was annexed to the petition in the Court below as Exhibit (A)."

[fol. 3] The Collector of Internal Revenue, after receiving the certificate of overassessment, certified the same as an overpayment by the petitioner for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against additional tax assessed for 1917 and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the petitioner (Special finding 11). The petitioner refused the check and never presented it for payment but has held it in its possession and has offered to apply it upon its claim, if the defendant so desired and agreed, and duly protested against the application of any part of the refund upon its tax for the year 1917 on the ground that the said tax for 1917 was barred by the Statute of Limitations (Special finding 11).

Petitioner brought this suit in the Court of Claims to recover the entire amount of the overpayment determined and allowed by the Commissioner of Internal Revenue. The United States filed a general traverse but subsequently and after the completion of the testimony and filing of

petitioner's brief, by permission of the Court, filed a counterclaim seeking to recover the said sum of $1,402.99, the balance remaining after the deduction of the taxes of 1917. The United States later abandoned its claim of right to deduct the taxes of 1917 from the amount of the overpayment for 1919, perforce of decisions in Bowers vs. New York & Albany Lighterage Co., 273 U. S. 346; Peerless Paper [fol. 4] Box Mfg. Co. vs. Routzahn, 22 Fed. (2d) 459; and Brady vs. U. S., 24 Fed. (2d) 205; and Section 1106 of the Revenue Act of 1926; and sought to defeat recovery by an attack upon the Commissioner's allowance of the claim, asserting for the first time that a proper claim for refund had not been filed and that therefore the Commissioner erred in his determination.

Treasury Department Regulations (T. D. 4265-6) provide that if an informal or defective claim was filed it could be perfected by a formal claim if the latter was filed on or before May 9, 1929.

The questions in dispute are:

1. Whether the Commissioner's determination of the overpayment and the allowance of the claim are binding upon the United States where neither fraud nor mistake is asserted.

And if that question be answered in the negative,

2. Whether the Commissioner's determination that the documents on file with him on May 22, 1925 constituted an informal claim for refund, was erroneous in law.

The Court of Claims by a divided vote of three to two held that the determination of the Commissioner was not final and conclusive and that his allowance of the claim was erroneous in law.

B

Reasons Relied on for the Allowance of the Writ

1. The decision of the Court of Claims in this case is directly in conflict with decisions of this Court and with a long line of decisions of the lower Court.

[fol. 5] U. S. vs. Savings Bank, 104 U. S. 728;
U. S. vs. Kaufman, 96 U. S. 567;
First National Bank of Greencastle vs. U. S., 15 Ct. Cls. 225;

Woolner vs. U. S., 13 Ct. Cls. 355;
Savings Bank of Pittsburgh vs. U. S., 16 Ct. Cls. 335;
Nixon vs. U. S., 18 Ct. Cls. 448;
Sybrandt vs. U. S., 19 Ct. Cls. 461.

2. The case involves an important question of statutory construction—whether under Section 3220 of the United States Revised Statutes (now Section 149, Title 26 of the United States Code) the determination of the Commissioner of Internal Revenue that there has been an overpayment of tax and his allowance of the claim therefor, are binding and conclusive upon the United States, in the absence of mistake or fraud; or whether such determination and allowance may be reviewed and repudiated by the Department of Justice or by other departments or officers of the United States.

3. The Court of Claims erred in holding that it had power to review the allowance by the Commissioner of Internal Revenue and to determine the sufficiency of the claim for refund filed by the petitioner, no fraud or mistake being claimed.

4. The Court of Claims erred in holding as a matter of law that the claim for refund filed with the Commissioner of Internal Revenue was insufficient in law.

5. The Court of Claims erred in dismissing the petition.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Claims of the United States, commanding that Court to certify and to send to [fols. 6 & 7] this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. H-554, Bonwit Teller & Company vs. United States, and that the said judgment of the Court of Claims may be reviewed by this Honorable Court and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Bonwit Teller & Company, by Arthur B. Hyman,
Counsel for Petitioner.

[fol. 1-a] IN UNITED STATES COURT OF CLAIMS

H-554

BONWIT TELLER & Co., Petitioner,

against

UNITED STATES, Respondent

I. PETITION—Filed Dec. 27, 1927

To the Honorable the Court of Claims:

The petitioner above named, Bonwit Teller & Co., by its attorneys, Paskus, Gordon & Hyman, respectfully shows and alleges:

For A First Cause of Action

One. That your petitioner is a corporation duly organized and existing under and by virtue of the laws of the State of New York, having its principal office and place of business at No. 417 Fifth Avenue, in the Borough of Manhattan, City of New York.

Two. That your petitioner has and at all the times hereinafter mentioned, had, in conformity with the rules and regulations adopted by the Commissioner of Internal Revenue, and in accordance with the statutes in such cases made and provided, established its fiscal year as beginning February 1st, and ending January 31st.

Three. That in accordance with the statute in such case made and provided, your petitioner duly prepared and duly [fol. 2-a] filed its income tax return for the fiscal year ended January 31, 1919, and paid to the Government of the United States, through its Collector of Internal Revenue for the Third District of New York, the sum of $57,871.16, as a tax upon the taxable income reported in said return.

Four. That thereafter and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue wrote your petitioner certifying, among other things, that your petitioner had made an overpayment of tax for the said fiscal year ended January 31, 1919, in the sum of Ten thousand eight hundred sixty-six and 43/100 ($10,866.43) Dollars.

Five. That thereafter, and on or about the 12th day of May, 1927, upon a claim for the refund of said overpayment the Commissioner of Internal Revenue duly delivered to your petitioner a certificate of overassessment by which it certified that a refund was due your petitioner in the said sum of $10,866.43. A copy of said certificate of overassessment is annexed hereto marked Exhibit "A" and made a part hereof.

Six. That simultaneously with the delivery of said certificate of overassessment, the Commissioner of Internal Revenue tendered to petitioner a check for the amount of said refund, with interest, less the sum of $9,846.06, which sum the Commissioner of Internal Revenue claimed represented an additional tax found by him to be due from petitioner for the fiscal year ended January 31, 1917.

Seven. That said alleged additional tax for the year ended January 31, 1917, was barred by the statute of limitations and was not a proper offset to petitioner's claim to a refund of an overassessment for the fiscal year ended January 31, 1919.

[fol. 3-a] Eight. That your petitioner has rejected said check and refused to accept said tender.

Nine. That by reason of the foregoing, respondent has received from your petitioner for the use and benefit of your petitioner, the sum of $10,866.43.

Ten. That no part of said sum has been paid although payment of same has been duly demanded.

Eleven. That no other action, suit or process is pending for or in respect to petitioner's claim in any other court against any person acting or professing to act mediately or immediately under the authority of the United States; that no person other than your petitioner is the owner of said claim, or interested therein; that no assignment or transfer of said claim or any part thereof or interest therein has been made; that your petitioner is justly entitled to the amount herein claimed from the United States of America after allowing all just credits and offsets; that your petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily, aided, abetted or given encouragement to rebel-

lion against the said Government; that your petitioner is a citizen of the United States and believes the facts as stated in this petition to be true.

For a Second Cause of Action

Twelve. Petitioner repeats and re-alleges, as a part of this cause of action, each and all of the allegations contained in the paragraphs "One," "Two," "Three," "Four" and "Eleven" contained in the first cause of action with like effect as if herein fully alleged, and incorporates herein all the allegations therein set forth.

Thirteen. That thereafter and on or about the 12th day of May, 1927, respondent, acting through the Commissioner [fol. 4-a] of Internal Revenue rendered a statement to your petitioner that petitioner's correct tax liability for its fiscal year ended January 31, 1919, was $47,004.73, and upon which statement the sum of $10,866.43 was actually found and agreed to be due to your petitioner by reason of the aforesaid overassessment. That a copy of said statement is hereto annexed marked Exhibit "A" and made a part hereof.

Fourteen. That respondent, acting through the Commissioner of Internal Revenue, then and there promised and agreed to pay said sum to your petitioner, but no part of said sum has been paid, although the payment of same has been duly demanded.

Wherefore petitioner prays judgment against respondent in the sum of Ten thousand eight hundred sixty-six and 43/100 ($10,866.43) Dollars, with interest thereon, from the 10th day of July, 1919, together with the costs and disbursements of this action.

Paskus, Gordon & Hyman, Attorneys for Petitioner,
Office & P. O. address; 2 Rector Street, Borough of Manhattan, City of New York.

[fol. 5-a] EXHIBIT "A" TO PETITION

Treasury Department, Office of Commissioner of Internal Revenue, Washington

Income Tax Unit

Certificate of Overassessment

IT:C:CC.

Number: 990988. Allowed: $10,866.43. Schedule No. 24417.

May 12, 1927.

Bonwit Teller and Company, 417 Fifth Avenue, New York, New York.

SIRS: An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the fiscal year ended January 31, 1919, indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:	
Original 41208	$57,871.16
April 1924, Special 2, P. O., L. O.	167,294.59
Total assesses	$225,165.75
Less: Previously allowed, Schedule IT:A—14872	167,294.59
Net assessment	$57,871.16
Correct tax liability	47,004.73
Overassessment	$10,866.43

This refund (or credit) is made in accordance with the provisions of Section 284 (g) of the Revenue Act of 1926. [fol. 6-a] The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

Abated: $——.
Credited: $9846.06.
To Tax. Year 1917—Mar. Wash. #3046—1923L.
Credited: $——.
To Tax. Year.
1020.37.
Refunded: $——.
Interest: $442.62.

Frank K. Bowers, Collector of Int. Rev. Second Dist. of N. Y. City.

Respectfully, C. R. Nash, Assistant to the Commissioner, by H. B. Robinson, Head of Division.

Instructions executed.

NOTE—The interest, if any included herein is taxable income, and must be included in your income tax return for the year in which received.

[fol. 7-a] *Duly sworn to by Fred A. Taylor. Jurat omitted in printing.*

[fol. 8] II. GENERAL TRAVERSE—Filed Feb. 4, 1928

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

A. H. McC.

[fol. 9] III. COUNTERCLAIM—Filed May 24, 1929, by Leave of Court

Now comes the defendant, and by leave of Court first had and obtained, files a counterclaim supplemental to its general traverse heretofore filed. Further answering the petition of the plaintiff, the defendant alleges as follows:

On July 14, 1919, the plaintiff filed its income and excess-profits tax return for the fiscal year ended January 31, 1919, reporting a tax due of $57,871.16, which said sum was paid to the defendant in two installments as follows:

July 14, 1919	$28,935.58
December 13, 1919	28,935.58

The Commissioner of Internal Revenue, on or about November 19, 1924, determined that the plaintiff's correct tax liability for said fiscal year was $47,004.73 and that plaintiff had overpaid its tax for said fiscal year in the amount of $10,866.43. No claim for refund having been duly filed [fol. 10] by plaintiff, the Commissioner was without authority to refund said amount, and plaintiff was so advised.

On March 3, 1925, Section 281 (e) of the Revenue Act of 1924 (43 Stat. 253, 302) was amended to read as follows:

If the taxpayer has on or before June 15, 1925, filed such a waiver, in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. (43 Stat. 1115).

On March 23, 1925, the plaintiff filed the waiver provided for by the 1924 Act as amended. On February 19, 1927, plaintiff filed formal claim for refund of said $10,866.43, which amount had been determined to have been an overpayment.

On March 4, 1924, the Commissioner of Internal Revenue duly approved and scheduled the certificate of overassessment for said $10,866.43 and said certificate of overassessment was delivered to plaintiff. Subsequently, and by check dated May 12, 1927, the sum of $1,462.97 was paid to plaintiff, which said sum consisted of $1,020.37 as overpayment of tax and $442.62 as interest on the overpayment.

The authorization and direction to refund to plaintiff the said sum was in excess of the power of the said Commissioner in that no valid claim for refund had been duly filed [fol. 11] by plaintiff within the period prescribed by the law.

Wherefore, the defendant prays that plaintiff's petition be dismissed and that defendant enter judgment against

the plaintiff in the sum of $1,462.97, plus interest thereon from May 12, 1927.

Respectfully submitted.

Herman J. Galloway, Assistant Attorney General. George H. Foster, Attorney. Frank J. Ready, Jr., Special Attorney, Bureau of Internal Revenue.

[fol. 12] IV. REPLICATION TO COUNTERCLAIM—Filed December 7, 1929, by Leave of Court

Comes now the petitioner and for replication to the counterclaim filed by the defendant herein alleges:

It admits that the plaintiff duly filed its Income and Excess Profits return for the fiscal year ended January 31, 1919, tax due of $57,871.16 and duly paid the tax thereon, and thereafter, and on or about the 19th day of November, 1924, the Commissioner of Internal Revenue determined that the plaintiff's correct tax liability for the said fiscal year was $47,004.73.

It admits that on March 23rd, 1925, plaintiff filed a waiver as alleged in said counterclaim.

That on March 4th, 1924, the Commissioner of Internal Revenue approved and scheduled a certificate of over-assessment in favor of the petitioner in the sum of $10,866.43 and delivered the said certificate to the plaintiff; subsequently, and on or about May 12th, 1927, the Commissioner of Internal Revenue tendered to the plaintiff a check in the sum of $1,462.97 which was arrived at by deducting from the sum of $10,866.43 the sum of $9,846.06 which said Commissioner claimed represented an additional tax found to be due for the fiscal year ended January 31st, 1917, which said tax and the collection thereof was and is barred by the Statute of Limitations in such cases made and provided, and the petitioner alleges that said check was neved accepted by it and that the sum represented thereby has never been paid to it.

The petitioner denies each and every of the allegations of the counterclaim not herein or in said petition specifically admitted and reiterates and realleges each and every of the allegations in said petition contained.

[fol. 13] Wherefore the petitioner demands judgment dis-

missing the counterclaim and for judgment as prayed for in the petition.

Respectfully submitted.

Arthur B. Hyman, Attorney for Plaintiff. Office & P. O. Address: Two Rector Street, Borough of Manhattan, New York City.

To Herman J. Galloway, Assistant Attorney General; Clerk of the Court of Claims of the United States.

Duly sworn to by Walter B. Bonwit. Jurat omitted in printing.

[fol. 14] V. Argument and Submission of Case

On February 11, 1930, this case was argued and submitted on merits by Mr. Arthur B. Hyman, for plaintiff, and by Mr. Geo. H. Foster, for defendant.

VI. Special Findings of Fact, Conclusion of Law, Opinion of the Court by Green, J., and Dissenting Opinion by Littleton, J.—Filed April 14, 1930.

Mr. Arthur B. Hyman, for plaintiff.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Herman J. Galloway, for defendant. Mr. Frank J. Ready, Jr., was on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

Special Findings of Fact

1. The plaintiff, Bonwit Teller & Co., is a corporation engaged in the business of selling feminine wearing apparel at retail. During the years involved in this action, plaintiff has established its fiscal year as beginning February first and ending January thirty-first.

2. On May 17, 1918, the plaintiff filed its income and profits tax return for its fiscal year ended January 31, 1917, and seasonably paid the taxes therein reported. On February 14, 1923, the plaintiff and the Commissioner of Inter-

nal Revenue executed a written agreement which operated to extend the period of limitation for determination, assessment, and collection of 1917 income taxes until April 1, 1924. No other or further waiver was ever executed with respect to that taxable period.

On March 28, 1923, the Commissioner of Internal Revenue made an additional assessment of $11,057.57 against the plaintiff for the fiscal year ended January 31, 1917. A portion of that assessment was subsequently abated, leaving a balance of $9,846.06 outstanding on the records of the collector. The plaintiff has paid no part of that balance and no suit or proceeding for the collection thereof has been instituted against it.

3. The plaintiff on or about July 14, 1919, filed its corporation income and profits tax return for the fiscal period begun February 1, 1918, and ended January 31, 1919, reporting $57,871.16 as the tax due upon its reported taxable income. The tax was paid by the plaintiff to the Government of the United States through its collector of internal revenue for the third district of New York; $28,935.58 of the said tax was paid on July 14, 1919; the remaining $28,935.58 was paid on December 13, 1919.

Pending the audit and review of the plaintiff's income and profits tax return for the fiscal period ended January 31, 1919, the Commissioner of Internal Revenue determined the plaintiff's total tax liability for that period to be $225,165.75 instead of $57,871.16 as returned, and in April, 1924, made a jeopardy assessment against the plaintiff for the difference of $167,294.59. No part of that additional assessment was paid, and on or about May 22, 1924, the plaintiff [fol. 15] filed a claim for abatement of the full amount thereof. The claim was thereafter allowed in full, as will hereinafter be related.

4. While the aforesaid claim for abatement was under consideration, and prior to its formal allowance, the Acting Deputy Commissioner of Internal Revenue addressed a letter to plaintiff under date of November 19, 1924, relating to the income tax liability of the plaintiff and its Massachusetts subsidiary company for the years 1919, 1920, and 1921, containing a schedule showing the manner in which the Internal Revenue Bureau had computed the tax for the plaintiff's fiscal year ending January 31, 1919, and a total over-

assessment of $178,161.02, from which a deduction was made of $10,866.43, leaving the amount overassessed for said fiscal year at $167,294.59.

In connection therewith it was further stated in explanation of the deduction:

"Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

The plaintiff was informed that a certificate of overassessment would be issued through the office of the collector of internal revenue for its district and would be applied by that official in accordance with the provisions of section 281 (a) of the revenue act of 1924.

The Commissioner of Internal Revenue subsequently allowed in full the plaintiff's claim for abatement of the additional 1919 assessment of $167,294.59 hereinbefore referred to, and duly issued and scheduled to the collector of internal revenue a certificate of overassessment, No. 715-402, in the plaintiff's favor for the said sum.

5. On December 11, 1926, Arthur B. Hyman, of Paskus, Gordon & Hyman, counsel for the plaintiff, addressed the following letter to C. R. Nash, assistant to the Commissioner of Internal Revenue:

"Under date of November 19th, 1924, you determined an apparent deficiency in tax against the above-named company for the years ended January 31st, 1918 to 1921, inclusive. Additional taxes were found to be due in the years 1918, 1920, and 1921. In the year 1919 you found an overpayment of tax in the sum of $10,866.43. (Page 5, Schedule 10.) You certified that inasmuch as section 281 of the revenue act of 1924 had not been complied with, the amount which would otherwise have been refundable—that is, $10,866.43—could not be refunded.

"Subsequently, under date of May 16th, 1925, you wrote to the taxpayer as follows:

" 'An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the

revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.'

"On May 22nd we wrote to you as follows:

[fol. 16] " 'J. G. Bright, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

" 'DEAR SIR: In accordance with your request, we enclose you herewith waiver.'

"Since that time we have heard nothing further from you and there has been no refund made to the taxpayer.

"In this connection we desire particularly to emphasize the fact that you yourself discovered the overpayment of taxes for the year in question in connection with the audit of the taxpayer's return. It is your custom in such cases to make immediate refund, that is to say, if there are available appropriations for that purpose. In your letter no suggestion was made that anything further was necessary than the filing of the waiver, which was very promptly done.

"A protest was filed by the taxpayer covering the year in question and a certificate of overassessment, No. 715402, Schedule No. 14872, was issued.

"It goes without saying, of course, that your office desires that every taxpayer should be accorded that to which he is entitled, and we presume, therefore, that you will see that such a disposition is made of this case."

6. The waiver referred to in the finding next preceding was received by the Bureau of Internal Revenue on May 23, 1925, and accepted in writing by the commissioner.

7. On February 9, 1927, C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed the following letter to counsel for the plaintiff:

"Further reference is made to your letter dated December 11, 1926, relative to the income-tax account of Bonwit Teller & Company, New York, New York, for the fiscal year ended January 31, 1919.

"In this connection you are advised that, in order that the allowance of the overassessment may be made you are

requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the adjustment, making reference in your reply to IT:C:CC:3:OTA."

On February 17, 1927, the following letter was sent to Mr. Nash:

"In accordance with your letter of February 9th, 1927, we enclose herewith for filing, claim for refund in the sum of $10,866.43, of Bonwit Teller & Co., on Form 843."

8. The plaintiff's claim for refund of $10,866.43 made out on Form 843 was received by and duly filed in the Bureau of Internal Revenue on or about February 19, 1927. The plaintiff alleged that it believed its application for refund should be allowed "for the reasons stated in letter of C. B. Allen, acting deputy commissioner, dated November 19, 1924, containing the symbols IT:CR:A:JML—addressed to the taxpayer, a copy of which is hereto annexed and made a part hereof."

9. On or about February 5, 1927, H. B. Robinson, head of the consolidated returns audit division of the Income Tax Unit, approved and recommended for allowance a proposed certificate of overassessment, No. 990988, showing overassessment and overpayment of $10,866.43 under the plaintiff's original income-tax return for the fiscal year ended January 31, 1919. The record of the case was then checked [fol. 17] in the claims control section of the clearing division, to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined with the approval of Mr. W. T. Sherwood, then head of the clearing division and now the Assistant Deputy Commissioner of the Income Tax Unit, that the documents on file, which included the bureau's audit letter of November 19, 1924, the bureau's letter to plaintiff of May 16, 1925, inviting a waiver and the reply made by plaintiff's counsel dated May 22, 1925, enclosing and filing the suggested waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

10. The letter dated May 22, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the commissioner, was received and filed by the Bu-

reau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter returning the waiver as follows: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." This indorsement was not dated. A further indorsement appears upon this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27."

On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43 and the following certifications appear upon the margin of the bureau's record copy of overassessment:

"Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27."

"Claim for refund filed May 23, 1925, waiver filed May 23, 1925."

"This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

11. The Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 and on or about March 8, 1927, duly approved and scheduled to the collector of internal revenue a certificate of overassessment, No. 990988, in the plaintiff's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the plaintiff. A copy of the said certificate of overassessment is annexed to the petition of the plaintiff as its Exhibit A and is made a part hereof by reference. The collector of internal revenue after receiving the certificate of overassessment, certified the same as an overpayment by the plaintiff for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against the additional tax assessed for 1917, referred to in Finding 2 hereof, and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the plaintiff. The plaintiff has never presented said check for payment but has held it in its possession and has offered to apply it upon the claim involved herein if the defendant so desired and agreed, and the plaintiff has protested against the application of any

part of this refund upon its tax for the year 1917 on the ground that said tax was barred by the statute of limitations.

[fol. 18] CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that plaintiff is not entitled to recover, and its petition is therefore dismissed.

The court further decides, as a conclusion of law, that the defendant is not entitled to recover on its counterclaim, and the counterclaim is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The plaintiff brings this suit to recover the amount of a refund alleged to be due from defendant on taxes paid by plaintiff for the fiscal year 1919. The defendant alleges that no claim for refund was filed until after the expiration of the period of limitations, and by way of counterclaim also alleges that part of the amount claimed by plaintiff was wrongfully paid to it and defendant therefore is entitled to judgment for the amount so paid.

The evidence shows without dispute that plaintiff made its return for the year 1919 and paid taxes accordingly, but the commissioner assessed $167,294.59 in addition thereto. The plaintiff filed a claim for abatement of the amount of this additional assessment which was allowed, and in recomputing the tax the commissioner found that the plaintiff had been overassessed $10,866.43. The plaintiff was notified of this overassessment about November 19, 1924, and at the same time was advised that—

"Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

Later the section above referred to having been amended, the commissioner, on May 16, 1925, wrote plaintiff that—

"An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and return one of the forms to this office."

In response to this letter, the plaintiff, on May 23, 1925, mailed to the commissioner a waiver which was duly accepted by the commissioner. Nothing further was done until December 11, 1926, when plaintiff's counsel wrote a letter to the commissioner calling attention to the proceedings which have been above recited and the letters to which reference has been made, stating in substance that it was [fol. 19] the custom in such cases to make immediate refund, and that in the letter of the commissioner there was no suggestion that anything further was necessary than the filing of the waiver, and concluding with a statement to the effect that it would be expected the taxpayer would receive that to which it was entitled. On February 9, 1927, a letter was written by the commissioner to counsel for plaintiff requesting that a claim be filed on the form enclosed in order that the overassessment might be allowed and in response thereto a claim for refund of $10,866.43 was filed with the bureau about February 19, 1927. Prior to the filing of this claim for refund, about February 5, 1927, the head of the consolidated returns audit division of the Income Tax Unit approved and recommended for allowance a certificate of overassessment and overpayment of $10,866.43 under the plaintiff's original income tax return for the fiscal year ending January 31, 1919. The record of the case was thereupon checked in the claims control section of the clearing division to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto and it was deter-

mined with the approval of Mr. W. T. Sherwood, the head of the clearing division, that the documents on file, which included those to which reference has been made hereinabove, would be treated by the bureau as an informal claim for refund filed May 23, 1925. Notations were made on the bureau's record copy of the proposed certificate of overassessment to the effect that an informal claim for refund had been filed May 23, 1925, with waiver perfected by claim Form 843. This bore the signature "O. Allen," with this further notation as follows: "This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen." After these proceedings the Commissioner of Internal Revenue allowed plaintiff's claim of refund and approved and scheduled to the collector of internal revenue a certificate of overassessment in plaintiff's favor. Thereafter the commissioner credited $9,846.06 of the amount allowed on the schedule on taxes due for 1917 and sent plaintiff a check for $1,462.99, which included the balance of the overassessment and interest thereon. This check has never been presented by plaintiff and as the taxes upon which the credit was made were at the time barred by the statute of limitations, the action of the commissioner in making this credit makes no defense herein.

We have set out these facts at length because it is necestary to consider them in determining two issues presented in the case which are—

First, whether the determination of the commissioner that a claim for refund had been filed is final and conclusive.

Second, if the decision of the commissioner is not conclusive, whether an informal claim for refund was in fact filed and made sufficient by the formal claim treated as an amendment thereto.

The plaintiff contends that the decision of the commissioner that an informal claim for refund had been filed and perfected by the one later filed in regular form was final and conclusive. We think it was no more final and conclusive than if he had made a decision that no claim for refund had been filed and for that reason rejected the claim for rebuttal. The decision of the commissioner on such a matter was not a mere administrative act, and even if it had

[fol. 20] been it could be impeached for fraud or mistake. We think it is reviewable in this court on the question of whether it was erroneous under the law, and therefore is not conclusive.

The plaintiff contends that the court does not have all the facts before it upon which the commissioner acted, but the findings show what was considered by a clerk in the office in coming to the conclusion that an informal claim for refund had been filed, and that the decision of this clerk was subsequently approved by the deputy commissioner. We cannot assume that there were any other matters which were taken into consideration. If the plaintiff or its attorney had presented to the commissioner anything further than appears in the findings in the way of making a claim, formal or informal, for this refund, obviously the plaintiff would have it in its power to produce evidence thereof. As it has produced no such evidence, although such evidence would be in its favor if produced, the court under well-settled principles has the right to conclude that no such evidence exists.

The record in the case shows that the commissioner and his officials took unusual pains to advise the plaintiff of its rights and gave it both notice and opportunity in abundant time to avail itself of them. The refund now sought is of taxes paid in December, 1919, and as the law then stood a claim for refund had to be filed by December, 1923. No claim was filed, and in April, 1924, an additional assessment for the year 1919 was made by the commissioner. A claim for abatement of this additional assessment was filed by the taxpayer in May, 1924, but no claim was then made that the amount originally paid was too large. The commissioner, however, in November, 1924, found that the plaintiff had been overassessed for 1919 in the sum of $10,866.43. Plaintiff was advised of this overassessment, but also notified that it could not be allowed as the time for filing a claim had expired. Doubtless with the intention of giving plaintiff and other taxpayers in a similar situation further opportunity to file claims for refund, on March 3, 1925, Congress passed an amendment to the revenue law relating especially to the taxes of 1919, providing in effect that if the taxpayer should before June 15, 1925, file a waiver in respect to such taxes, a claim for refund thereof might be

filed on or before April 1, 1926, thus making a special exception in favor of taxpayers who had failed to file a claim for refund on taxes of 1919 within the time required by law. The plaintiff having taken no action under this provision of the statute for more than two months, the bureau wrote a letter to plaintiff calling attention to the statue and stating it would be necessary that a waiver be filed and enclosing a form of waiver. The plaintiff thereupon executed a waiver and filed it with the department, but still did nothing in the way of filing a claim. In fact it was not until December 11, 1926, that the bureau heard from plaintiff again when its counsel wrote a letter reviewing the correspondence that had passed between the bureau and the plaintiff and stating in effect that it was assumed that the amount of the overassessment would be refunded. This, it will be observed, was over eight months after the limitation had expired for filing claims under the amended statute. It is upon this record that the bureau finally held that an informal claim of refund had been filed in May 23, 1925, when the waiver was filed. In other words, the bureau held [fol. 21] that the filing of the waiver constituted an informal claim for refund under the circumstances, but there was nothing in the circumstances to justify any such conclusion. It was simply a case where the plain provisions of the statute were utterly ignored by the plaintiff.

Upon the question as to whether a claim for refund, informal or otherwise, was filed by the plaintiff within the period of limitations, the facts in the case leave no doubt. Absolutely nothing in the way of a claim for refund was filed by plaintiff until February 19, 1927, about eight months after a claim for refund was barred by the statute of limitations. It may possibly be said that the plaintiff was misled by the letter from the commissioner stating that the claim could not be allowed unless a waiver was filed, and that when the waiver was accordingly filed the plaintiff had the right to believe that the claim would be paid without any further action being taken on its part. But there is no claim that defendant's officials waived the filing of a claim for refund and plaintiff's attorney could hardly have been misled to the detriment of plaintiff by this letter. If the statute of limitations had run a short time after the writing of the letter it possibly might be said that

plaintiff had been prejudiced by it. But the period of limitations did not expire until about ten months after the receipt of this letter and after a reasonable time had expired the failure of the department to take any action on the refund was practically notice to the plaintiff that the commissioner did not intend to allow it under the situation in which it then stood. The plaintiff, instead of taking up the matter again in a short time with the commissioner, delayed until after the statute of limitations had run and then counsel for plaintiff wrote the commissioner a letter in effect stating that it assumed that payment would be made without any further action on plaintiff's part. This, it seems to us, was an inattention to the matter for which no justification can be found in the letters from the commissioner's office, and if the letter of plaintiff's counsel indicating expectation that the refund would be paid constituted an informal claim for refund, we find it was sent after the period of limitations had expired.

It is urged that the claim for refund which was filed long after the statute of limitations had expired may be considered as an amendment perfecting plaintiff's claim. Whether this claim for refund, which was complete in itself and made no reference to any other instrument, could in any event be considered an amendment we are not called upon to determine. In any event, it can not be considered an amendment to something which did not exist and the plaintiff, up to the time the limitation had expired, had made no kind of a claim and filed no statement which could possibly be construed as a claim for refund, either formal or informal, in the sense that the words are used in the statute, or any other. What the plaintiff actually did was to assume that the refund would be paid without the filing of any claim. If there had been any justification for this assumption it might be that the filing of a refund claim was waived, but the record shows clearly, as we think, that there was none. On the contrary, the failure of the commissioner to take any action for months after the filing of the waiver we think was sufficient notice to plaintiff that something further was required on its part. It ought also be said in this connection that plaintiff does not allege that the filing [fol. 22] of a claim for refund was waived, but rests its case upon the theory that neither under the evidence nor

the law can the original decision of the commissioner be reviewed by this court and that this decision is final and conclusive. For the reasons above stated we do not think this position is well founded. Having reached this conclusion we hold that the evidence clearly shows that the commissioner erred in deciding that an informal claim for refund had been filed when in fact no claim for refund of any kind was filed until after the expiration of the period of limitations.

It has been held in a number of cases, and so far with the approval of the Supreme Court, that even where a claim for refund is filed, it must state the grounds of the claim. In most of these cases, like the one at bar, the evidence showed that the plaintiff would have been entitled to the refund had it complied with the provision of the statute with reference to filing the claim which this court considered binding upon it. If we sustain the claim of plaintiff, then, as it seems to us, we disregard the plain provisions of the statute and put the rights of a taxpayer which has filed no claim at all on a higher basis than those of one which has filed a claim but through mistake of law or some other error has failed to put it in proper form. We do not think the commissioner can properly hold that letters or papers which make no mention of a claim for refund and use no language which can be construed as making such a claim, constitute in fact an informal claim. Such a construction would practically nullify the statute.

The defendant as before stated, sets up a counterclaim and seeks to recover the amount of the payment made by the commissioner on the plaintiff's claim for refund. In support of the counterclaim it is urged that the commissioner had no authority to make this payment, as no claim for refund was filed until after the expiration of the period of limitations and the payment was not made until still later. We do not find it necessary to determine whether the commissioner had authority to pay the refund or any part of it after the statute of limitations had run. The existence of plaintiff's claim did not depend upon the filing of a claim for refund. The claim arose from the fact that plaintiff had overpaid its tax. The statutory requirement that a claim for refund should be filed and also the limitations on the time when suit might be brought are simply

conditions required by the Sovereign Government to exist before suit could be begun on the claim and have nothing to do with the validity of the claim. Nor did the validity of plaintiff's claim at all depend on the authority of the commissioner to make the payment. All of these matters are merely statutory provisions which at most only pertain to the right of the plaintiff to bring suit and which Congress could repeal or change at any time, and thereby without in any way affecting the nature of the claim itself enable plaintiff to recover by suit the balance of the overpayment. The situation is analogous to a case where a person holding a claim which is valid but barred by the statute of limitations receives payment from the party against whom the claim is held. The statute barred the remedy but did not extinguish the liability. Plaintiff received this payment on a claim which had not been extinguished, and having so received it, the amount received became its property. We know of no theory upon which the Government [fol. 23] can claim that this money is due it. The fact that the plaintiff could not have recovered it by suit, as we have shown, does not defeat its right to keep it which is founded on a just claim against the Government. The counterclaim therefore can not be sustained.

It will be observed that a peculiar situation has arisen in the case. We have held that the Government was prevented from applying any of the overpayment upon the taxes of previous years by the statute of limitations. We have also held that the amount which the Government undertook to so apply could not be recovered by plaintiff by reason of the statutory provisions requiring the filing of a claim for refund within a given time. But while the court has felt constrained to apply these arbitrary rules of statutory law the final result is that abstract justice is done in that the Government has received the amount of the taxes due it in all the period involved in the case; and the plaintiff has paid no more than it justly owed and is permitted to retain the balance of its overpayment after these taxes have been settled. While the court is not influenced in the least by this result in coming to its decision, it can view the outcome with entire equanimity.

The petition and counterclaim must be dismissed, and it is so ordered.

WILLIAMS, Judge, and BOOTH, Chief Justice, concur.

DISSENTING OPINION

LITTLETON, Judge, dissenting:

I think the plaintiff should recover. If it made an informal claim the commissioner had a right to make the refund. The commissioner held that an informal claim had been made on May 23, 1925, and allowed the refund of $10,866.43, which was an overpayment found to have been made on the original return, and at no time did he ever change his decision.

It appears from the exhibits filed that the plaintiff made a return for the fiscal year ending January 31, 1919, showing a tax of $57,871.16, which was duly paid. On the April, 1924, special list, the commissioner made a jeopardy assessment of an additional tax of $167,294.59 for the fiscal year 1919. Plaintiff filed a claim for abatement. This claim is not in evidence. Thereafter an internal revenue agent made an investigation and an examination of the plaintiff's records and, on May 31, 1924, made a report to the commissioner of the result of his examination with reference to plaintiff's tax liability for the fiscal year 1919. As a result of the report of the revenue agent, which was made the basis of the commissioner's final determination, the commissioner finally determined that the correct amount of the total tax due for the fiscal year 1919 was $47,004.73, resulting in a total overassessment of $178,161.02, which overassessment was made up of $10,866.43 of the tax reported and paid on the original return and the total of the jeopardy assessment of $167,294.59 which had not been paid. On November 19, 1924, the commissioner mailed plaintiff a notice of this determination and advised it that the total of the additional jeopardy assessment would be abated, but that inasmuch as no claim for refund had been filed within the time required by section 281 of the [fol. 24] revenue act of 1924 the overassessment of $10,866.43 could not be refunded or an overassessment allowed in respect thereon. In accordance with this determination the commissioner on or about November 19, 1924, prepared a certificate of overassessment and approved a schedule of overassessment of $167,294.59, being the total

overassessment of $178,161.02 less $10,866.43 which at that time was not refundable.

Subsequently Congress passed the act of May 3, 1925, amending section 281 (e) of the revenue act of 1924. This amendatory act provided that "If the taxpayer has on or before June 15, 1925, filed * * * a waiver in respect of the taxes due for the fiscal year 1919, * * * credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed * * * on or before April 1, 1926 * * *." Thereupon the commissioner, on May 16, 1925, sent to the plaintiff a notice on a form prepared for that purpose in which he referred to his determination of an overassessment for 1919 and stated: "It appears that the overassessment can not now be allowed due to the limitation of time for allowance thereof provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 (e) of the revenue act of 1924." With this notice the commissioner sent the plaintiff two waivers and suggested that one of them be executed and returned. The waiver was executed by plaintiff on May 22, 1925, and its counsel returned the same to the commissioner with a letter stating: "In accordance with your request, we enclose herewith waiver." This letter and the waiver were received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter of plaintiff's counsel returning the waiver as follows: "Inferential demand for the refund upon basis of schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." A further endorsement appears on this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27." On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43, and the certifications set forth in Finding 10 were made on the bureau's copy thereof, and the correspondence set forth in the findings of fact took place. On March 8, 1927, a schedule of overassessment for the $10,866.43 was signed by the commissioner and transmitted to the collector at New York. The collector made his report to the commissioner and thereafter

the commissioner sent plaintiff the certificate of overassessment for the $10,866.43 showing that $9,846.06 thereof had been credited against a 1917 tax and the balance of $1,020.37 refunded, together with $442.62 interest. The bureau wrote on this certificate the following: "Waiver filed May 23, 1925. Refund claim filed May 23, 1925."

On June 3, 1927, counsel for plaintiff wrote the commissioner a letter with reference to the overpayment of $10,866.43 calling his attention to the fact that the tax for 1917, against which $9,846.06 of the overpayment had been credited, was barred by the statute of limitation at the time the credit was made and that the entire amount should be refunded, and asking that this be done. On October 26, [fol. 25] 1927, the commissioner replied and after conceding that the credit against the 1917 tax was made after the expiration of the statutory period of limitation within which the 1917 tax could be collected, and after referring to the decision of the Supreme Court in New York and Albany Lighterage Company v. United States, 273 U. S. 346, stated: "You are advised that the question of the proper action to be taken in cases where an overassessment for one year has been credited against an additional tax for another year after the expiration of the statutory period of limitation on the collection of tax for such year is now under consideration by the general counsel of the bureau in connection with the position taken by the Government in the case of the Peerless Paper Box Company v. Routzahn * * *. As soon as a decision is reached on this question you will be further advised." No further advice was given plaintiff and it instituted this suit to recover the portion of the the overpayment allowed which had been credited against an outlawed 1917 tax. The petition was filed January 7, 1928, and a general traverse was entered February 4, 1928. The case was referred to a commissioner for hearing and report. The hearing was held before the commissioner who filed his report April 4, 1929. Plaintiff filed its brief May 18, 1929. Thereafter, on May 24, 1929, the defendant filed a counterclaim insisting, for the first time, that no claim had been made in time, and asking for the recovery of that portion of the overpayment and interest for 1919 that had been refunded.

In view of all the facts and circumstances, I am of opinion that the Commissioner of Internal Revenue was justified in holding that the execution and filing of the waiver with the letter dated May 22, which waiver and letter were received and filed by the bureau on May 23, 1925, constituted an informal claim for refund made in time, which informal claim was perfected by a formal claim later filed. This view does not give the taxpayer who has made an informal claim, and who perfects such claim by the filing of a formal one, any greater right than a taxpayer who has filed a claim on the form prescribed by the commissioner's regulations which fails to state the grounds for the claim. The general rule is that an informal claim may be perfected by a formal claim and that a claim filed on the proper form, but which does not state the grounds for the refund, may also be perfected by an amendment specifically setting forth the grounds or that this defect may be waived by the commissioner. For these reasons I think the counterclaim should be denied and that judgment should be given for the plaintiff.

The situation here is different from the ordinary case involving the sufficiency of the grounds of a claim, such as was before the court in Tucker v. Alexander, 275 U. S. 228, or where the plaintiff has taken no steps whatever toward obtaining a refund, as was the case in Kings County Savings Institution v. Blair, 116 U. S. 200. The allowance of the refund by the commissioner is equivalent to an account stated between private parties, which is good until impeached for fraud or mistake, and the fact of fraud or mistake must be clearly established by competent evidence. United States v. Kaufman, 96 U. S. 567; United States v. Savings Bank, 104 U. S. 728. There is here no question of fraud. The burden is upon the Government to establish that the Commissioner of Internal Revenue made a mistake [fol. 26] when he held that an informal claim had been made. In my opinion the record does not sustain this claim of the defendant. The statute does not specify the form or contents of a claim for refund upon which the commissioner may act. He has considerable discretion in the matter. The purpose of requiring the claim is either definitely to end the controversy if none is filed or to keep the matter of the tax liability alive by the filing, and to give

the commissioner the right to pay the amounts erroneously collected. The decision of the commissioner as to the sufficiency of the claim under the peculiar circumstances existing in the particular case should be given considerable weight. In cases such as this any documents filed by the taxpayer in an effort and for the purpose of obtaining a refund, and which satisfy the commissioner that the taxpayer is asking for a refund of an admitted overpayment, are sufficient under the statute to constitute an informal claim that might be perfected as this claim was.

GRAHAM, Judge, concurs.

[fol. 27] VII. JUDGMENT

At a Court of Claims held in the City of Washington on the 14th day of April, A. D., 1930, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the Court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

The Court further decides, as a conclusion of law, that the defendant is not entitled to recover on its counterclaim, and the counterclaim is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this court, the amount thereof to be ascertained by the clerk and collected by him according to law, which amount is found to be $44.52.

[fol. 28] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,204. Court of Claims. Term No. 282. Bonwit Teller & Company, petitioner, vs. the United States for the cost of printing the record in this exhibit thereto. Filed July 9, 1930. File No. 35.204.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

FILE
AUG 15
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & COMPANY, *Petitioner*,
vs.
THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

ARTHUR B. HYMAN,
Counsel for Petitioner.

Washington, D. C.,
August 9, 1930.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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BONWIT TELLER & COMPANY, *Petitioner,*

vs.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

(The Jurisdiction Included.)

I.

THE OPINIONS OF THE COURT BELOW.

The opinions of the Court of Claims were rendered April 14, 1930, and are not yet reported. They are printed at pages 18-25 and 26-30 of the Record.

II.

JURISDICTION.

1. The statutory provision believed to sustain jurisdiction is Sec. 3(b) of the Act of February 13, 1925,

Ch. 229, 43 Stat. 939; U. S. C. Title 28, Section 288(b).

2. The judgment sought to be reviewed was entered April 14, 1930 (R. 30). The petition for certiorari was filed July 9, 1930 (R. 30).

3. The suit in which the judgment is sought to be reviewed was instituted in the Court of Claims to recover income and profits taxes erroneously collected (R. 5). Judgment was there rendered dismissing the petition.

4. Cases believed to sustain the jurisdiction are:

United States vs. Jones, 119 U. S. 477;
Phelps vs. United States, 274 U. S. 341;
Jacob Reed's Sons vs. United States, 273 U. S. 200;
Fred T. Ley & Co. vs. United States, 273 U. S. 386.

III.

STATEMENT OF THE CASE.

Suit was instituted in the Court of Claims to recover against the United States the sum of $10,866.43 which had been determined and certified by the Commissioner of Internal Revenue as an overpayment of taxes for the year 1919 (R. 16-17). The question involved is whether, in such a suit, the action of the Commissioner in allowing the claim is binding upon the United States where neither fraud nor mistake is asserted.

The petitioner's income tax return for the fiscal year ended January 31, 1919, was filed on or about the 14th day of July, 1919 (Special finding 3, R. 13). Thereafter upon audit of the return the Commis-

sioner found and so advised the taxpayer under date of November 19, 1924, that its tax had been overassessed in the sum of $10,866.43 (Special finding 4, R. 13). The period of limitation then in effect had run against the allowance of a refund, but the statute was subsequently amended (Act of March 3, 1925; Ch. 435, 43 Stat. 1115) so as to permit such allowance.

In accordance with that amending Act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver is filed on or before June 15th, 1925." Thereupon, on May 22, 1925, the taxpayer filed the required waiver, with a letter saying, "In accordance with your request, we enclose you herewith waiver" (Special finding 5, R. 14). Still later, on February 9, 1927, the Commissioner again wrote taxpayer in respect to the matter, requesting a formal claim executed on the departmental Form 843. This form duly executed was filed on or about February 19, 1927 (Special findings 6-8, R. 15-16). The Commissioner treated the waiver and letter of May 22, 1925, in connection with the prior correspondence and proceedings, as an informal or defective claim for refund, perfected by the formal claim on Form 843, and allowed the claim in the amount of $10,866.43 (Special findings 9-10, R. 16-17). On or about March 8th, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment, No. 990988, in petitioner's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the petitioner (Special finding 11, R. 17). A copy of that certificate was annexed to the petition in the Court below as Exhibit "A" (R. 8-9).

The Collector of Internal Revenue, after receiving the certificate of overassessment, certified the same as an overpayment by the petitioner for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against an additional tax assessed for 1917 and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the petitioner (Special finding 11, R. 17). The petitioner refused the check and never presented it for payment but has held it in its possession and has offered to apply it upon its claim, if the defendant so desired and agreed, and duly protested against the application of any part of the refund upon its tax for the year 1917 on the ground that the said tax for 1917 was barred by the Statute of Limitations (Special finding 11, R. 17).

Petitioner brought this suit in the Court of Claims to recover the entire amount of the overpayment determined and allowed by the Commissioner of Internal Revenue. The United States filed a general traverse (R. 9) but subsequently and after the completion of the testimony and filing of petitioner's brief, by permission of the Court, filed a counterclaim seeking to recover the said sum of $1,402.99, the balance remaining after the deduction of the taxes of 1917 (R. 11). The United States perforce abandoned its claim of right to deduct the taxes of 1917 from the amount of the overpayment for 1919 in view of the decisions in *Bowers vs. New York & Albany Lighterage Co.*, 273 U. S. 346; *Peerless Paper Box Mfg. Co. v. Routzahn*, 22 Fed. (2d) 459; and *Brady v. U. S.*, 24 Fed. (2d) 205; and Section 1106 of the

Revenue Act of 1926, Ch. 27, 44 Stat. 113; and sought to defeat recovery by an attack upon the Commissioner's allowance of the claim, asserting for the first time that a proper claim for refund had not been filed and that therefore the Commissioner erred in his determination.

Treasury Department Regulations (T. D. 4265-6) provide that if an informal or defective claim was filed it could be perfected by a formal claim if the latter was filed on or before May 1, 1929.

The questions in dispute are:

1. Whether the Commissioner's determination of the overpayment and the allowance of the claim are binding upon the United States where neither fraud nor mistake is asserted.

And if that question be answered in the negative,

2. Whether the Commissioner's determination that the documents on file with him on May 22, 1925, constituted an informal claim for refund, was erroneous in law.

The Court of Claims by a divided vote of three to two held that the determination of the Commissioner was not final and conclusive and that his allowance of the claim was erroneous in law (R. 18, 26, 30).

IV.

SPECIFICATION OF ERRORS.

1. The Court of Claims erred in holding that the determination of the Commissioner of Internal Revenue of an overpayment of taxes and his allowance of a claim for refund were not binding upon the United States, there being no mistake or fraud claimed or proved.

2. The Court of Claims erred in holding that it had the power to review the allowance by the Commissioner of Internal Revenue and to determine the sufficiency of the claim for refund filed by the petitioner, no fraud or mistake being claimed.

3. The Court of Claims erred in holding as a matter of law that the claim for refund filed with the Commissioner of Internal Revenue was insufficient in law.

4. The Court of Claims erred in dismissing the petition.

V.

ARGUMENT.

The Allowance of a Claim for Refund by the Commissioner of Internal Revenue is Binding Upon the United States Until by Proper Action it is Impeached for Fraud or Mistake.

The Commissioner of Internal Revenue allowed petitioner's claim for refund. In this suit to recover upon such allowance, the United States seeks to repudiate the action of the Commissioner. It is not disputed that the refund is allowable on the merits. The defendant's sole attack is upon the sufficiency of the claim for refund.

The Commissioner of Internal Revenue is vested with exclusive authority on behalf of the United States "to remit refund and pay back all taxes erroneously or illegally assessed or collected * * *". R. S. Sec. 3220; Ch. 27, 44 Stat. 115; U. S. C. Title 26, Sec. 149. That section and other pertinent statutory provisions are set forth in the appendix hereto.

The Commissioner's allowance of a claim is in the

nature of an account stated and is binding upon the United States unless fraud or mistake is proved by competent evidence. *United States vs. Savings Bank*, 104 U. S. 728; *United States vs. Kaufman*, 96 U. S. 567. See also *United States vs. Detroit Steel Products Co.*, 20 Fed. (2d) 675, 677, and *Peerless Paper Box Manufacturing Co. v. Routzahn*, 22 Fed. (2d) 459.

To the same effect and directly in conflict with the ruling in this case are the following decisions of the Court of Claims:

First Natl. Bank of Greencastle vs. U. S., 15 Ct. Cls. 225;
Woolner vs. U. S., 13 Ct. Cls. 355;
Savings Bank of Pittsburgh vs. U. S., 16 Ct. Cls. 335;
Nixon vs. U. S., 18 Ct. Cls. 448;
Sybrandt vs. U. S., 19 Ct. Cls. 461.

The United States made no claim of, and offered no proof to establish, fraud or mistake in the allowance of the claim in this case. The adverse decision of the majority of the Court of Claims was upon the ground that there was a misconstruction of law by the Commissioner (R. 22). The disputed ruling of the Commissioner was that the documents filed May 22, 1925, taken in connection with the prior correspondence and proceedings, constituted an informal claim for refund. This was not a misconstruction of law, since it was not a question of law. It was a question of fact, the decision of which insofar as the United States was concerned was confided by the statute to the Commissioner. The Commissioner's determination has never been revoked and the certificate has not been recalled nor has it been attacked in any proceeding for fraud or mistake.

If the Commissioner's ruling that the documents on file on May 22, 1925, constituted an informal claim for refund is not open to review in this proceeding, there is not any other question open. It is not disputed that the informal claim was perfected by the formal claim filed February 19, 1927. The whole procedure was, therefore, valid and proper under the terms of Treasury Decision 4266, and petitioner was entitled to judgment.

We incorporate herein by reference the minority opinion of the Court of Claims (R. 26-30).

The Court of Claims Erred in Holding as a Matter of Law That No Proper Claim for Refund Was Filed.

Even if the Commissioner's certificate of overpayment and allowance of the claim for refund were open to review, there was not any error of fact or law which invalidated the determination of the Commissioner that this amount was due to the petitioner. The only fault claimed by the defendant is the holding by the Commissioner that an informal claim for refund had been filed by May 22, 1925.

The statute does not define a "claim for refund" but leaves the matter to the regulations of the Commissioner and the Secretary of the Treasury. There are formal claims for refund prepared strictly in accordance with the regulations and informal or defective claims which fail to meet one or more of the detailed requirements of the regulations. The existence and effect of the latter have been long recognized—certainly since 1884, when they were discussed in 14 Op. Atty. Gen'l. 814. The whole subject was elaborately considered in Law Opinion 1116,

published in Internal Revenue Cumulative Bulletin III-1, at pages 350-359. Under the terms of Treasury Decision 4266, approved by the Secretary of the Treasury March 27, 1929, informal or defective claims were held to be sufficient to toll the statute of limitations if perfected by formal claims filed prior to May 1, 1929. This Treasury Decision was a statement of a long standing practice of the Bureau of Internal Revenue.

The purpose of the statutory requirement for filing a claim for refund is to give the Commissioner of Internal Revenue notice of the existence of the claim and of the grounds upon which the claim is made.

In this case the Commissioner had full notice; he himself had already ascertained the overpayment and had invited the filing of a waiver so that a refund could be made under the terms of the amended statute. The documents on file, therefore, constituted a valid claim for refund in full compliance with the statute and were so treated by the Commissioner.

Any defect in the form or contents of the claim for refund was merely a failure to comply with the regulations. Such a procedural defect could be, and in this case was, waived by the Commissioner. *Tucker vs. Alexander,* 275 U. S. 228; See also *Art Metal Construction Company vs. United States,* 35 Fed. (2d) 379, 380-381; *Zeller vs. United States,* 35 Fed. (2d) 870, 872; and *Swift & Company vs. United States,* 67 Ct. Cls. 322, 331.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the status of

the certificate of overpayment by the Commissioner of Internal Revenue may be definitely determined and settled and that an error in the construction and application of the statute may be corrected; and to such end that a writ of certiorari should be granted and this Court should review the decision of the Court of Claims and finally reverse it.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

Washington, D. C.,
August 9, 1930.

APPENDIX.

R. S. Sec. 3220, Ch. 27, 44 Stat. 115, as amended and in force at the date the claim for refund was allowed, provided:

> "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations, prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, * * *."

The pertinent provisions of Section 284 of the Revenue Act of 1926 (Chap. 27, 44 Stat. 66) are:

> "(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

"(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"

Section 319 of the Revenue Act of 1926 relates to estate taxes and is not pertinent here.

Section 281 (e) of the Revenue Act of 1924 (the act prior to the Revenue Act of 1926) as amended by the Act of March 3, 1925, Ch. 435, 43 Stat. 1115, provided:

> "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & CO.,
Petitioner,

against

THE UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BONWIT TELLER & CO., PETITIONER.

ARTHUR B. HYMAN,
Counsel for Petitioner.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

BRIEF FOR BONWIT TELLER & CO., PETITIONER.

This case is before the Court on a writ of certiorari granted October 13, 1930 (51 Sup. Ct. 34), and involves a suit brought by the respondent in the United States Court of Claims for the recovery of a sum of money certified by the Commissioner of Internal Revenue as an overpayment of taxes for the year 1919, and allowed by him as a refund to the petitioner.

Opinions Below.

The United States Court of Claims, 39 F. (2d) 730; (R. 18-30).

The judgment of the Court of Claims based upon the special findings of fact made by the Court dismissed the petition. Judge Green wrote the prevailing opinion supporting the judgment, which was concurred in by Judge Williams and Chief Justice Booth. Judge Littleton wrote in dissent, and his opinion was concurred in by Judge Graham.

Jurisdiction.

This Court has jurisdiction under Section 3 (b) of the Act of February 13, 1925 (c. 229, 43 Stat. 939, U. S. c. Title 28, Section 288 [b]).

The petitioner prayed for a writ of certiorari on the ground that the Court of Claims had departed from well settled principles enunciated by this court, as well as its own, in holding that the determination of the Commissioner of Internal Revenue that an overpayment of taxes had been made, and granting a refund thereof, were not binding upon the United States in the absence of fraud or mutual mistake, and that it had the power to review his action and to determine the sufficiency of the claim for refund filed with him. It also prayed for the writ upon the ground that the Court of Claims erred in reversing the Commissioner's action.

Questions Presented.

1. Is the determination of the Commissioner of Internal Revenue, fixing the tax liability of a taxpayer and allowing a refund of overpayment, binding upon the United States, where neither fraud nor mistake is asserted?

2. If an action upon his certificate of allowance, has the Court of Claims the power to review his determination and to pass upon the sufficiency of the claim for refund?

3. Was the refund in the instant case properly allowed by the Commissioner of Internal Revenue?

The Statutes Involved.

R. S. Sec. 3220, Ch. 27, 44 Stat. 115, as amended and in force at the date the claim for refund was allowed, provides:

> "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926, the Commissioner of Internal Revenue, subject to regulations, prescribed by the Secretary of the Treasury, is authorized to remit, refund, and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected, * * *."

Section 284 of the Revenue Act of 1926 (Chap. 27, 44 Stat. 66) provides:

> "(a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924 or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

* * * * * * * * *

(g) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. *If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid.* * * *" (Italics ours.)

Section 281 (e) of the Revenue Act of 1924 (the act prior to the Revenue Act of 1926) as amended by the Act of March 3, 1925, Ch. 435, 43 Stat. 1115, provided:

"If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the

taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. * * *"

It will be noted that the amendment of 1925 forms part of section (g) of the 1926 Act.

Statement of the Case.

This action was brought to recover the sum of $10,866.43 and interest representing an overpayment of income and profits tax made by the petitioner for the fiscal year ended January 31, 1919, the overpayment having been certified by the Commissioner of Internal Revenue of the United States, and the refund thereof duly allowed by him for the full amount in suit. The action was necessitated by the fact that the Commissioner of Internal Revenue applied against the overpayment, a tax alleged to be due from the petitioner for the fiscal year ended 1917, the collection of which was, at the time of such application, concededly barred by the Statute of Limitations in such cases made and provided.

The petition in the Court of Claims contains two causes of action (R. 5-7). The first recites the filing by petitioner of a tax return for the fiscal year ended January 31, 1919 and the payment of tax in the sum of $57,871.17, the certification by the Commissioner of Internal Revenue to the petitioner that it had overpaid the tax in the sum of $10,866.43, the issuance by the Commissioner of Internal Revenue to the petitioner of the certificate of over-assessment for the said sum upon a claim for refund thereof, the tender of payment of the amount, less the tax alleged by the Commissioner to be due from the petitioner for the year 1917 amounting, with interest, to the sum of $9,846.06, and the rejection of the tender and the demand for pay-

ment of the full amount represented by the Certificate of over-assessment and over-payment, to wit, $10,866.43.

The second cause of action recites that on or about the 12th day of May, 1927, the respondent duly stated an account with the petitioner showing its liability for taxes for the fiscal year ended January 31st, 1919, upon which statement there was found and agreed to be due to petitioner the sum of $10,866.43, said statement being annexed as Exhibit "A" (R. 8-9).

A general traverse to the petition was filed by the United States, and upon the issues framed by the petition and this general traverse, testimony was taken and completed before a Commissioner of the Court of Claims.

The only question ever at issue between the United States and the petitioner up to that time was whether or not the $10,866.43, which the latter had been allowed, could legally be reduced by crediting against it a tax, the collection of which was barred by the Statute of Limitations. Before the Commissioner, the United States definitely abandoned its position, admitted that the deduction had been erroneously made and attempted to attack the integrity of the certificate of over-assessment by asserting that the Commissioner of Internal Revenue should not have issued it. Petitioner insisted that such matter was not in issue under the general traverse; that the certificate of over-assessment could not be attacked in the action; that it was valid and binding until in proper manner it should be revoked and cancelled and that such cancellation and revocation must be sought, if at all, by direct action; that to succeed in such an action fraud or mutual mistake must be established. Appropriate objection was therefore made to all evidence offered to support the position taken by the respondent's counsel. However, all of it was received and considered and made the subject of special findings by the Court of Claims. (Appendix.)

After the taking of the testimony had been completed and the petitioner had filed its brief with the Court, the

respondent was permitted to file a counterclaim against the petitioner for the difference between the sum of $10,866.43 the amount of the overpayment for 1919 and the amount of $9,846.06 alleged to be due from the petitioner for the year 1917. This difference was the sum of $1,020.37, check for which had been tendered to the petitioner and rejected by it. This counterclaim was based upon the assertion that the Commissioner had no right to allow the refund or issue his certificate of overassessment. The counterclaim having been dismissed in the Court below, and there being no controversy here concerning it, no further reference will be made to it.

For the fiscal year involved in this suit, the Commissioner of Internal Revenue, faced with the running of the Statute of Limitations against the assessment and collection of the tax, made a jeopardy assessment in the sum of $167,249.59 (Special Finding 3, R. 13). This was duly protested and a claim for abatement filed. As a result of proceedings arising therefrom, the Commissioner of Internal Revenue determined that not only were there no additional taxes due, but that the petitioner had overpaid its tax in the sum of $10,866.43 (Special Finding 4, R. 13).

Under date of November 19, 1924, the Commissioner of Internal Revenue notified the petitioner of its determination but advised that inasmuch as the provisions of Sec. 281 (governing refunds) of the Act of 1924 had not been complied with, he could not refund the overpayment (Special Finding 4, R. 14). Whether he was correct at that time in declining to make the refund under the circumstances, it is unnecessary to consider.

In March of 1925, Subdivision E of Section 281 of the Revenue Act of 1924 was amended. The subdivision originally extended the time for allowance of refunds in favor of those who filed waivers, but this extension was limited to taxes up to the fiscal year 1918. The amendment made

similar provision for allowance of refund of taxes for the year 1919 and thus cured the objection which the Commissioner had made and enabled him to make the refund of the overpayment above referred to.

After the amendment was passed, the Commissioner wrote to the taxpayer under date of May 16, 1925, as follows:

> "An examination of your income-tax return for the year ended January 31, 1919, discloses an apparent over-assessment of tax for the year. It appears that the over-assessment can not now be allowed, due to the limitation of time for allowanee thereof, provided by section 281 of the revenue act of 1924, *unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.*" (Italics ours.) (Special Finding 5, R. 14.)

On May 22nd, the waiver was forwarded by the petitioner to the Bureau of Internal Revenue and was received on the 23rd and accepted in writing by the Commissioner (Special Finding 5, 6, R. 15).

Subsequently the Commissioner requested the petitioner to execute and file a formal claim on form 843 furnished by him, setting forth the basis of the adjustment which was, of course, that already determined by him. This formal claim was immediately filed (Special Finding 7, R. 15-16). Upon receipt of this, the Commissioner allowed the claim for refund and duly issued his certificate No. 990988 showing overassessment and overpayment by the petitioner of the sum of $10,866.43 for the fiscal year ended Jan. 31, 1919 (Special Finding 9, R. 16). Thereafter, the Commissioner of Internal Revenue having credited against this overpayment the sum of $9,846.06 sent to the petitioner a check for $1,462.99 representing the balance of

the overpayment amounting to $1,020.37 and interest in the amount of $442.62. This check was rejected and the petitioner having failed to persuade the Commissioner that he could not legally deduct from the amount of the overpayment, an amount claimed by him to be due from the petitioner for taxes of 1917, collection of which had been barred by the Statute of Limitations, brought this suit.

We make reference in detail to the findings only for the purpose of giving to the court a clear understanding of how this controversy arose. This detailed statement discloses that the refund was not allowed in the first instance because the Commissioner claimed that it was barred by the Statute of Limitations and that it was allowed subsequently under the enabling amendment of 1925.

We contended below that in this action the certificate of overassessment and overpayment alone was material; that the only issue before the Court was whether the barred tax of 1917 could be properly set off against the overpayment; that the impropriety of this deduction having been conceded, there was no other issue before the Court; that the integrity of the certificate of the Commissioner could not be attacked in this action, and that if it were subject to attack at all, it must be attacked upon the ground that fraud had been practiced in its procurement, or that a mutual mistake of fact had led to its issuance.

The Court of Claims by a vote of three to two has held that the action of the Commissioner in allowing the claim for refund is not binding and conclusive in this action; that it has the power to review his action and to determine its propriety and it has reversed him and dismissed the petition. We contend that the Court below has erred in all these respects.

ARGUMENT.

Under Section 3220 of the Revised Statutes and under Section 284 of the Revenue Act of 1926 in effect at the time of the allowance of the refund in the instant case, the Commissioner of Internal Revenue is authorized to remit, refund and pay back all taxes erroneously or illegally assessed, and collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected. He is the only officer of the United States so empowered and his determinations, within the scope of the authority vested in him are final, conclusive and binding upon the United States, in the absence of fraud or mutual mistake.

In the instant case, the Commissioner of Internal Revenue has determined that the petitioner overpaid its taxes for the fiscal year ended January 31st, 1929 in the sum of $10,866.43 and has, pursuant to the authority exclusively vested in him, duly allowed and directed the refund thereof. The Collector having certified that the petitioner was indebted to the United States for additional taxes for the year 1917, offset it against the overpaid tax and tendered a check to the petitioner for the difference, which was rejected. Thereupon, petitioner brought this suit, and, as we have shown, the United States, having admitted that it could not legally offset the alleged tax of 1917, the collection of which was barred by the Statute of Limitations, attacked the determination of the Commissioner of Internal Revenue allowing the refund, and the integrity of the certificate which he had issued, upon which the suit was based.

The assertion that the Commissioner of Internal Revenue is vested with exclusive authority to determine on behalf of the United States the liability of those subject to

tax, the amount of such tax, and whether there has been an overpayment, and if so, whether refund thereof should be allowed, has not and cannot be controverted. A long line of decisions places the stamp of finality and conclusiveness upon his determination and action until impeached for fraud or mutual mistake.

U. S. v. *Kaufman*, 96 U. S. 567;
U. S. v. *Savings Bank*, 104 U. S. 728;
U. S. v. *Louisville*, 169 U. S. 249;
Penrose v. *Skinner*, 278 Fed. 284;
U. S. v. *Detroit Steel Products*, 20 Fed. (2d) 675, 677;
Woodworth v. *Kales*, 26 Fed. (2d) 178;
Atlanta Casket Co. v. *Rose*, 22 Fed. (2d) 800;
Woolner v. *U. S.*, 13 Ct. Cls. 355;
Bank of Greencastle's case, 15 Ct. Cls. 225;
Dugan v. *U. S.*, 34 Ct. Cls. 458;
Sybrandt v. *U. S.*, 19 Ct. Cls. 461.

In *United States* v. *Kaufman*, supra, the Court said:

"It is now insisted that the finding of an allowance by the Commissioner is not enough, and that the Court should have gone behind the allowance and found the facts in respect of the original claim. *Such we think is not the law.* To say the least, the allowance of a claim under this statute is equivalent to an account stated between private parties which is good until impeached for fraud or mistake. It is not the allowance of an ordinary claim against the government by an ordinary accounting officer but the adjudication by the first tribunal to which the matter must by law be submitted. Until so submitted and until so adjudicated, there is not even a prima facie liability of the government, but when submitted and when allowed upon the adjudication, the liability is complete until in some appropriate form it is impeached. When, therefor, the court found the adjudication against the government without impeachment, the liability to pay

was established. We do not decide that in the Court of Claims the adjudication of the Commissioner may not be impeached, but we do decide that until impeached it is binding and that the affirmative of the impeachment is upon the Government."

In *United States* v. *Savings Bank*, supra, the Commissioner of Internal Revenue had certified a claim to recover taxes and penalties, but upon the presentation of the certificate, the Treasury Department refused to make payment. Action was brought in the Court of Claims to recover. Mr. Chief Justice Waite who had also written the opinion in *United States* v. *Kaufman*, supra said:

"Whether his allowance is conclusive on the other officers through whose hands it must necessarily pass before it can be paid by the Treasurer, we did not then and need not now decide. All we said then and all we say now is that if payment is not made by reason of the refusal of any of the officers of the department to pass or pay the claim after it has once been allowed by the Commissioner the allowance may be used as a basis of an action against the United States in the Court of Claims where it will be prima facie evidence of the amount that is due and put on the Government the burden of showing fraud or mistake. This burden is not overcome by proving that some other officer in the subsequent progress of the claim through the department declined to do what the law or treasury regulations required of him before payment could be obtained. The fact of fraud or mistake must be established by competent evidence the same as any other fact in issue."

In *United States* v. *Detroit Steel Products Co.*, supra, which was an action to recover taxes paid on leaf springs, after the refund thereof by the Commissioner of Internal Revenue, the court said (p. 677):

"Section 3220 of the United States Revised Statutes, as amended, which is now Section 149, of Title

26 of the new United States Code (Comp. St., Sec. 5944), provides that the Commissioner of Internal Revenue 'is authorized to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected.' It is settled law that where, as here, Congress has conferred upon the Commissioner of Internal Revenue authority, in such broad language as is contained in the statute already quoted, to determine whether taxes have been erroneously collected, and should therefore be remitted or refunded to a taxpayer, it must be held that it was the congressional intention to intrust the determination of the questions therein involved to the discretion of the Commissioner acting in a quasi judicial, rather than a ministerial capacity, and that his exercise of such discretion, unless impeached for fraud or mistake, must be accepted as final and conclusive, and not subject to review. United States v. Kaufman, 96 U. S. 567; 24 L. Ed. 792; United States v. Real Estate Savings Bank, 104 U. S. 728; 36 L. Ed. 908; United States v. Louisville, 169 U. S. 249; 18 S. Ct. 358; 42 L. Ed. 735; Penrose v. Skinner (D. C.), 278 F. 284; United States v. Trainer National Spring Co. (no opinion filed), but recently decided by Judge Baltzell in the United States District Court for the District for Indiana.

"As was pointed out by the Court in United States v. Real Estate Savings Bank, supra, 'the fact of fraud or mistake must be established by competent evidence, the same as any other fact in issue. An allowance by the Commissioner in this class of cases is not the simple passing of an ordinary claim by an ordinary accounting officer, but a statement of accounts by one having authority for that purpose under an act of Congress.' No evidence has been offered in this case tending to show that the action of the Commissioner of Internal Revenue in ordering the refund to the defendant here in question was procured by means of any fraud or mistake, and such action is therefore now binding and conclusive upon the government, and not subject to review by this court."

No Fraud, Mistake or Error in Calculation.

It is to be noted that nowhere in the record is there any assertion that fraud or mutual mistake led to the allowance of the claim for refund or the issuance of the certificate upon which the suit was brought. The Commissioner of Internal Revenue has not revoked or cancelled nor attempted to revoke or cancel the certificate or in any manner to change his determination. On the contrary, he apparently stands firmly upon the propriety of his action.

Distinction Between Allowed and Rejected Claims.

The Court of Claims has disregarded the foregoing enunciations of principle and has assumed the authority to review the action of the Commissioner of Internal Revenue as in a certiorari proceeding or upon a direct appeal from the Commissioner's determination. In assuming this authority, the Court lost sight of fundamentals. The Commissioner of Internal Revenue represents the United States. He is vested with exclusive authority to determine the liability of taxpayers and to refund and pay back all sums erroneously or illegally collected. *So far as the United States is concerned, there is no proceeding provided for the review of his determinations.* Upon the United States, therefore, such determination is binding and conclusive and under no circumstances can the propriety of his action be inquired into in the Court of Claims. True it is that in the proper forum and upon proper pleadings, his allowance of a claim might have been impeached for fraud, deceit or mutual mistake, but that does not involve his jurisdiction or his power to determine every question which is within the scope of his authority and to bind the United States thereby. By his determinations the United States is not aggrieved. They have vested in him

the sole and exclusive authority to make them and, manifestly, he cannot appeal from his own determinations.

On the other hand, a taxpayer aggrieved by such determination has been accorded the right of review.

We emphasized below the distinction between the cases of a rejected claim for refund and an allowed claim therefor. The court noted the emphasis but confessed that it was unable to see the distinction.

To us it appeared obvious, and it appeared equally so to the court in *Peerless Paper Box Manufacturing Co.* v. *Routzahn*, 22 Fed. (2d) 459, where a similar question arose and where the court said:

> "Further, the government claims that no proper refund was filed as a condition precedent to filing this suit, and that the suit is barred by the Statute of Limitation. These contentions made by the government so far as the law relied upon goes, are not to be seriously disputed; but the facts stipulated here, it seems to me, do not bring the case within the principles contended for by the government. *This taxpayer is not seeking to maintain a suit to obtain a judgment for a rejected claim for refund, but to obtain a sum of money already determined and awarded by the Commissioner of Internal Revenue to belong to it as an over-payment of tax for 1918 and wrongfully applied by the defendant as a credit against the barred tax liability for the year 1917.*" (Italics ours.)

If this were an action brought to recover upon a claim which had been disallowed by the Commissioner of Internal Revenue, every question affecting the right of the petitioner to recover would be open to the United States; but this is not such an action. On the contrary, it is one to recover upon an account stated based upon the certificate of the United States that the taxes have been erroneously collected. The action was necessary and was brought not because of any infirmity in the plaintiff's claim, but

because of the assertion by the United States of the right to deduct from the amount concededly due to plaintiff, a sum which it is admitted it had no right to deduct. That improper attempt to collect indirectly a tax barred by the statute, was responsible for this controversy. It was the only issue involved and, in our view, the only one that could possibly be open for consideration. When the government abandoned it before the trial, there was no other issue for the court to pass upon.

No Review of Commissioner's Action.

It is to be noted that there is no procedure known to the law by which the determinations of the Commissioner of Internal Revenue may be reviewed. They cease to be material in any action seeking to test the liability for taxes or the right to recover overpayments. We have pointed out that no action or proceeding can be instituted by the United States. If an action be instituted by a taxpayer, it proceeds de novo. What the Commissioner may have done becomes unimportant. So it is also in proceedings before the United States Board of Tax Appeals. We are unable to see, therefore, upon what theory the court assumed to pass upon the propriety of the Commissioner's action.

As said in substance by this Court in *United States* v. *Kaufman,* supra, the petitioner was satisfied with his action. In fact, he based his claim upon it. The United States had not and could not have appealed from it. The Court of Claims, since it has no judicial authority to review the determination of the Commissioner has, by force of its decision, established itself as a branch of the executive department empowered to supervise and review the action of the Commissioner, and for this there is no authority. *As a matter of fact, the decision is completely*

destructive of the statutory authority vested in the Commissioner of Internal Revenue.

A long line of decisions in the Court of Claims itself voices disapproval of its procedure in the instant case.

In *Woolner* v. *The United States*, supra, it was urged by the United States in the Court of Claims that the Commissioner did not have sufficient evidence upon which to found his decision.

The Court said:

> "But that is beyond our jurisdiction to determine. When the law intrusts the decision of any question of fact to a designated public officer, the sufficiency of the evidence depends upon his own judgment and cannot be reviewed by any other officer or any tribunal. What would be sufficient for him, might not be sufficient for other minds and what would be sufficient for others, might be quite insufficient for him. It is enough for us to know that the Commissioner acted upon some evidence which was satisfactory to himself. *It is also urged that the certificate accompanying the application did not conform to that prescribed by the regulations. That is wholly immaterial, because it does not appear that it was the whole evidence acted upon, and the collector's certificate was a substantial compliance with the regulation under the circumstances and in connection with the records which it may be presumed the Commissioner had access to, and especially because it was received, accepted and acted upon by him, and cannot now be excepted to in this court for the first time.*" (Italics ours.)

The force of the words above quoted cannot be better illustrated than by the case at bar. The Commissioner of Internal Revenue, the sole officer to whom the duty of passing upon claims for refund is entrusted by the United States, has determined that a proper claim for refund of taxes admittedly overpaid has been presented to him and he has allowed it. It has been approved by the account-

ing department, and yet, in an action brought upon the allowance the Court below, without all the evidence before it, has determined that the Commissioner erred in his determination and in the issuance of the certificate. The Court of Claims has thus indulged in a process of review as upon a certiori to the Commissioner without, however, the institution or pendency of any such proceeding and without having had certified to it the entire record of the proceedings before him.

In *Bank of Greencastle's Case* (supra), passing upon a similar question, the court referred to Section 3220 and 3228 saying:

> "By these provisions Congress has conferred upon the Commissioner of Internal Revenue the power and duty of passing upon the merits and determining the validity of all claims for refund of taxes therein specified. His decisions thereon are in the nature of awards made by arbitrators. * * * We have heretofore had occasion to consider some of those cases, * * * But when the officer who is clothed with that power has allowed the claim and made his certificate to that effect, a new cause of action arises by implied contract or statute upon that certificate, into which the original demand is merged and may be prosecuted to judgment in this court, if for want of an appropriation or other cause its payment is refused at the Treasury. These views have been sustained by the Supreme Court. Kaufman's Case, 96 U. S. 567. * * *
>
> "After a claimant has applied to the Commissioner for the refund of a tax alleged to have been illegally assessed and wrongfully paid, it is for him to lay before that officer all the evidence upon which he relies to prove the facts; and it then becomes the duty of the Commissioner to weigh the evidence, to exercise his best and impartial judgment upon it, and to decide whether or not the claim shall be allowed. From the Commissioner's decision there is no appeal to any other executive office, on the one side or the other. * * * If the decision is in his (taxpayer's) favor and the Commissioner makes and certifies to an allowance, the liability of the United States becomes

fixed and the claimant's right to payment established. * * *

"The statute above cited authorizes the Commissioner himself to refund and pay back all taxes illegally assessed or collected; and were it not for the fact that the money received from internal revenue taxation is covered into the Treasury, instead of being passed to the credit of the Commissioner, he might pay the allowances made by him directly and without certifying them to the accounting officers. The latter course is made necessary by the requirements of the Constitution and laws relating to the drawing of money from the public Treasury. * * *

"There is no doubt that an allowance by the Commissioner may be impeached anywhere for fraud, for that avoids all contracts into which it enters as against the party defrauded; or for want of jurisdiction; or for a mistake apparent upon the certificate of allowance; or generally for such other irregularities in the proceedings as would avoid an award made by arbitrators so far as the proceedings are similar; but not for what might seem to others to be a mere mistake of judgment in the weighing and giving force and effect to evidence."

"In the present case the only attempt on the part of the defendants to impeach the Commissioner's allowance is an effort to show that the original claim was not presented to him within two years after it accrued, as required by the statute and by the regulations prescribed by the Secretary of the Treasury. That was one of the facts in the case which the Commissioner was to determine." (Italics ours.)

The court, after adverting to various steps in the proceeding, said further:

"The Commissioner allowed the claim, coming to the conclusion that it was presented within the time required, and we are not prepared to say that we should come to a different determination if it were within our jurisdiction to review his action on that evidence. *We hold, however, that the Commissioner's decision on that point upon evidence before him,*

in the absence of fraud or irregularity, was conclusive and cannot be set aside in this court. Woolner's Case, 13 C. Cls., R. 355." (Italics ours.)

Dugan v. *The United States,* 34 C. Cls. 458, and the very recent case of *Swift* v. *U. S.,* 68 Ct. Cls. R. 97, are to the same effect.

The Court below has pointed to no authority to support the views it has expounded in the instant case. We find nothing to justify the revolutionary attitude adopted unless it be contained within its suggestion that no injustice is being done in view of the fact that there was an unpaid assessment against the taxpayer for 1917, barred by the Statute of Limitations. That it was influenced thereby it expressly denies. Whenever by indirection an illegal result is achieved, an injustice has been done. The collection of the tax for 1917 was barred (*Bowers* v. *New York & Albany Lighterage Company,* 273 U. S. 346; Revenue Act of 1926, Sec. 1106). Such barred tax cannot be offset against an overpayment; *Peerless Paper Box Co.* v. *Routzahn,* supra, (followed, *Brady* v. *U. S.,* 24 Fed. (2nd) 205). The U. S. was forced to and did abandon a contrary position. To permit its collection by the process adopted below is to pay a price out of all proportion to the result of the moment. The principles which have been disregarded are more important to the United States than the result that has been thrust upon it in the instant case.

Assuming that the action of the Commissioner of Internal Revenue in allowing plaintiff's claim for refund was open to review by the Court of Claims, the Court erred in holding, as a matter of law, that the allowance of the claim for refund was improper.

As we have said before, the court below has reversed the determination of the Commissioner of Internal Revenue as if an appeal from his ruling had been presented to it.

It has held that he improperly issued a certificate of over-assessment and granted the claim for refund, and it bases this holding upon the assertion that no proper claim for refund had ever been filed with the Commissioner. We think the court erred in so holding.

Limitation on Refund.

It appears from the record that in November of 1924, the Commissioner had determined that the petitioner had overpaid income tax in the amount for which it subsequently issued its certificate of over-payment (Special Finding 4, R. 13). The period of limitation then in effect precluded the refund of the overpayment, but the statute was subsequently amended (Act of March 3, 1925, c. 43, Stat. 1115) so as to permit such allowance.

Limitation Removed
Refund Allowed.

In accordance with that amending act, on May 16, 1925, the Commissioner wrote the taxpayer that the refund could not be allowed "unless an income and profits tax waiver was filed on or before June 15th, 1925." Thereupon, on May 22nd, 1925, the taxpayer filed the required waiver and on or about February 19th, 1927 at the request of the Commissioner filed a formal claim on Form 843. On or about March 8, 1927, the Commissioner duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in petitioner's favor and on or about May 12, 1927, caused the original certificate to be delivered to the petitioner. A copy of that certificate was annexed to the petition in the court below as Exhibit "A" (R. 8, 9) and formed the basis of the plaintiff's suit.

The respondent put in evidence various records on file in the office of the Commissioner with a view to showing that he had acted improperly in issuing the certificate of

over-assessment and allowing the claim for refund. This evidence was made the subject of special findings which indicate that on or about February 5th, 1927, H. B. Robinson, Head of Consolidated Return Audit, Income Tax Unit, approved and recommended for allowance a proposed certificate of over-assessment No. 990988 showing over-assessment and overpayment of $10,866.43 under plaintiff's income tax return for the fiscal year ended January 31st, 1919. The record of the case was then checked in the claims control section of the clearing division to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined, with the approval of Mr. W. T. Sherwood, then head of the clearing division, but now the Assistant Deputy Commissioner of the Income Tax Unit that the documents on file which included the Bureau's audit letter of November 19th, 1924, the Bureau's letter to plaintiff on May 16, 1925, requiring a waiver, the reply made by plaintiff's counsel dated May 22nd, 1925, enclosing and filing the suggested waiver, would be treated by the Bureau as an informal claim for refund filed May 23, 1925 (Finding 9, R. 16).

The letter dated May 22nd, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the Commissioner was received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue endorsed upon the letter returning the waiver, as follows:

> "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1925. Rules and Regulations, Mulligan."

This endorsement was not dated. A further endorsement appears upon this letter as follows:

> "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen 4/4/27."

On February 5th, 1927, the Bureau executed a certificate of overassessment for $10,866.43 and the following certifications appear on the margin of the Bureau's record copy of overassessment:

> "Waiver filed May 23, 1925. Formal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen 3/4/27.
>
> Claim for refund filed May 23, 1925; waiver filed May 23, 1925.
>
> This C. of O. approved for scheduling as is by H. T. S. (Signed) O. Allen, 4/4/27" (Finding 10, R. 16-17).

It was found also that the Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 on or about March 8, 1927; duly approved and scheduled to the Collector of Internal Revenue a certificate of overassessment No. 990988 in plaintiff's favor and on or about May 12th, 1927, caused the original certificate to be delivered to the plaintiff. It was contended that these certifications and records did not indicate the filing of a proper informal claim for refund and that, therefore, the filing of a formal claim thereafter could not perfect it despite the view of the Commissioner to the contrary (Finding 11, R. 17-18).

Incomplete Record of Proceedings before Court of Claims.

Before discussing the question of law we insist, as we did below, that there is nothing to indicate that the papers offered were a complete record of the proceedings before the Commissioner. The Court of Claims has said that if there was anything favorable in the record before the Commissioner, it was incumbent upon the petitioner to produce it, and that the court would have the right to conclude that there was nothing of that character, in the

absence of its production by the petitioner. We challenge this as an improper statement of the law governing such matters. It overlooks the presumption of propriety and regularity attaching to the certificate of the Commissioner of Internal Revenue.

U. S. v. *Chemical Foundation, Inc.*, 272 U. S. 1.

Presumption from Certificate.

It overlooks the fact that that certificate is prima facie evidence upon which the petitioner has the right to rely and that anyone directing an attack against it, has the burden of showing, by clear and satisfactory evidence that it was improperly issued. This presumption of regularity extends to every step required by law to be taken as a condition to its issuance.

The overpayment of the tax had been determined as early as November, 1924, as the result of a claim for abatement and protest filed against an additional assessment. It is evident from the record that the petitioner was endeavoring to secure the refund of this overpayment. The bar of the limitation statute precluded the refund. The bar was removed by amendment early in 1925, and thereafter, the Commissioner immediately took the matter up and indicated his willingness to refund the tax upon the filing of a waiver as provided by the amendment. This waiver was filed. No suggestion was made that time that anything further was desired by the Commissioner. Subsequently, he requested the filing of a formal claim on the departmental form provided for that purpose. This was executed and immediately filed. Thereafter, he issued his certificate of overassessment. Assuming that the certificate was open to attack, it was incumbent upon the attacking party to show that there was nothing before the Commissioner upon which he could properly allow the claim. The respondent has fallen far short of maintaining that burden,

and there is no finding that there was not other evidence before the Commissioner.

If we assume, however, that the question was open for review and that the respondent has produced all the evidence that was before the Commissioner, we submit that the allowance of the claim for refund was entirely proper.

Informal Claims for Refund.

The statute does not define "a claim for refund" but leaves the matter to the regulations of the Commissioner and the secretary of the Treasury. There are formal claims for refund prepared strictly in accordance with the regulations and informal or defective claims which fail to meet one or more of the detailed requirements of the regulations. The existence and effect of the latter have been long recognized—certainly since 1884 when they were discussed in 14 Op. Attorney General 814. The whole subject was elaborately considered in Law Opinion 1116 published in Internal Revenue Cumulative Bulletin III-1, pages 350 to 359. Under the terms of the Treasury decision 4266 approved by the Secretary of the Treasury March 22, 1929, informal or defective claims were held to be sufficient to toll the Statute of Limitations if perfected by formal claims filed prior to May 1st, 1929. This treasury decision was a statement of a long standing practice of the Bureau of Internal Revenue.

Purpose is Notice.

The purpose of the statutory requirement for filing a claim for refund is to give the Commissioner of Internal Revenue notice of the existence of the claim and the grounds upon which the claim is made. In this case the Commissioner had full notice. He himself had already ascertained the overpayment and had invited the filing of a waiver so that a refund could be made under the

terms of the amended statute. The documents on file, therefore, constituted a valid claim for refund and full compliance with the statute, and were so treated by the Commissioner.

In *Tucker* v. *Alexander*, 275 U. S. 228, 231, this court in speaking of the statutory requirements and regulations affecting claims for refund, said:

> "The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is insisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government, and decidedly in the interest of an orderly administrative procedure, that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the government no officer of the government may waive statutes of limitations. *Finn* v. *United States*, 123 U. S. 227. Such waivers, if allowed, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist—consequences which do not attach to the waiver here."

The attack made in the instant case is not upon the merit of the claim. Concededly the overpayment was made and was refundable. It is charged that proper claims therefor were not filed and that, therefore, the Commissioner should have denied the claim. Counsel for the United States has endeavored to make it appear that the instant

case involves the right of the Commissioner to waive the Statute of Limitations. The record shows, however, persistent effort on the part of the petitioner to recover the refund. It was admittedly refundable but for the bar of the statute. When the bar was lifted, the Commissioner accepted the papers on file with him as a proper claim for refund. Whatever objection may have been made was to irregularities only, and this the Commissioner waived. We do not admit that there was irregularity, nor that it was at all necessary for the Commissioner to have required the subsequent filing of a formal claim. He might have made the allowance without it, but he chose to require it and it was furnished.

Informality Cured or Waived.

In *Zeller* v. *U. S.*, 35 Fed. 2(d) 870, the point decided was similar to that involved in this case, except that here the petitioner is seeking the enforcement of a claim already allowed, while there the Commissioner had rejected the claim. In the *Zeller* case, it was contended that the tax assessed was erroneous and that a proper claim for refund was filed, but it was contended that it was filed too late for acceptance. The court said that the propriety of the government's contention rested upon whether or not the Commissioner was sufficiently apprised of the grounds asserted to enforce the informal claim. The Commissioner had, without objection, repaid part of the excess payment. The court held, upon the merits, that the government had waived any claim of informality and quoted at length from *Tucker* v. *Alexander*, 275 U. S. 228. The court referred also to the decision in the Court of Claims in *Swift* v. *U. S.*, 68 C. Cls. R. 97, where it was stated that an insufficiency in the statement of claim for refund was merely one of form and could be cured by such amendment as the plaintiff subsequently filed, even though made after the expiration of the Statute of Limitations.

To the same effect is *Art Metal Construction Co.* v. *The United States*, 35 Fed. 2(d) 379, where it was said:

> "It clearly was the duty of the Commissioner to make refund of a tax when there was overpayment, and upon failure so to do, the taxpayer has a right of recovery, provided he has filed a proper claim for refund. * * * Assuming the insufficiency of the original claim for refund, it is nevertheless important to note that the Commission retained it without objection until the statute of limitations expired, and as the entire litigation concerning the tax of 1917 related to plaintiff's application for special assessment, and the letter amending the original claim specifically related thereto, I am of opinion that the Commissioner treated the insufficiency as a mere informality. * * * (Citing Tucker v. Alexander and other cases.)
>
> * * * Nor does the delay in filing the second waiver bar recovery, for amendment to a claim for refund may be submitted even though the Statute of Limitations has expired. Upon this point see Swift & Co. v. The United States, 67 Ct. Cls. 322, decided March 18, 1929. * * * We are not dealing with a waiver of the Statute of Limitations or loss of jurisdiction or statutory power by the Commissioner, but rather with a waiver of a departmental regulation promulgated for the convenience of taxing officials, and to enable them to properly discharge their duties and prevent litigation. * * *
>
> It is my opinion that the defect in the original claim was waived by the Commissioner, who treated it as a sufficient claim; that the Statute does not bar recovery; and that the action was brought within the period of limitation."

In the cases which we have referred to, there was a refusal by the Commissioner to grant the refund. He claimed non-compliance with statutory provisions or regulations. In the instant case, he has certified the compliance and the judicial department of the government has reversed him.

Decision Destructive of Powers of Commissioner.

It must be evident that recognition of the doctrine promulgated by the Court of Claims leads to an absolute destruction of the statutory power of the Commissioner to audit claims and to determine whether taxpayers are entitled to refunds. It results in passing on to the judicial branch of the government a right of review of the Commissioner's actions and, in the final analysis, establish the court as the original forum for the determination of such claims. The same thing would apply to every other department of the Government. The Court of Claims would thus become a court of visitation and supervision upon the executive branches of the government.

If the Court of Claims had the power to review the action of the Commissioner and if it properly found infirmity in the first cause of action, the petitioner was nevertheless entitled to judgment on its second cause of action which was upon an account stated.

We have referred to and quoted at length from the decisions of this Court, the Court of Claims and others such as U. S. v. Kaufman, U. S. v. Savings Bank, Bank of Greencastle's Case, all supra, for the purpose of showing that upon the issuance of the certificate of the Commissioner of Internal Revenue the liability of the United States to pay in accordance therewith becomes fixed and established; that the action then proceeds upon an implied promise or an account stated. The doctrine of these cases seems never to have been departed from until the decision in the instant case. In the recent case of *United Motors Corp.* v. *U. S.*, 44 Fed. 2(d) 407, where the defense was interposed that the claim for refund filed by the plaintiff was inadequate, the District Court said:

> "The Commissioner acted upon the claim as filed, sustained it in part and issued a certificate of over-

assessment as to the part allowed. The present action is based upon such certificate and not upon the original overpayment of tax. The plaintiff has chosen to treat the certificate as an implied promise to pay by the United States (U. S. v. Kaufman) or as an account stated (U. S. v. Savings Bank). Under such circumstances the sufficiency of the claim for refund is of no consequence. Nor is there any force in the point that the plaintiff should have filed another claim for refund based upon the certificate of overassessment."

In such an action, that is, upon an implied promise or account stated, inquiry into the action of the Commissioner is entirely improper. All such matters become immaterial after the issuance of the certificate. No defense cognizable at law was interposed, to the second cause of action. The only defense possible was that of fraud or mistake and it was not and could not have been pleaded or proved. No suggestion of fraud or mistake appears upon the record.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Claims dismissing the petition should be reversed, and that judgment should be directed by this Court in favor of petitioner for the amount sued for, and interest.

Respectfully submitted,

ARTHUR B. HYMAN,
Counsel for Petitioner.

Appendix.

Special Findings of Fact.

1. The plaintiff, Bonwit Teller & Co., is a corporation engaged in the business of selling feminine wearing apparel at retail. During the years involved in this action, plaintiff has established its fiscal year as beginning February first and ending January thirty-first.

2. On May 17, 1918, the plaintiff filed its income and profits tax return for its fiscal year ended January 31, 1917, and seasonably paid the taxes therein reported. On February 14, 1923, the plaintiff and the Commissioner of Internal Revenue executed a written agreement which operated to extend the period of limitation for determination, assessment, and collection of 1917 income taxes until April 1, 1924. No other or further waiver was ever executed with respect to that taxable period.

On March 28, 1923, the Commissioner of Internal Revenue made an additional assessment of $11,057.57 against the plaintiff for the fiscal year ended January 31, 1917. A portion of that assessment was subsequently abated, leaving a balance of $9,846.06 outstanding on the records of the collector. The plaintiff has paid no part of that balance and no suit or proceeding for the collection thereof has been instituted against it.

3. The plaintiff on or about July 14, 1919, filed its corporation income and profits tax return for the fiscal period begun February 1, 1918, and ended January 31, 1919, reporting $57,871.16 as the tax due upon its reported taxable income. The tax was paid by the plaintiff to the Government of the United States through its collector of internal revenue for the third district of New York; $28,935.58 of the said tax was paid on July 14, 1919; the remaining $28,935.58 was paid on December 13, 1919.

Pending the audit and review of the plaintiff's income and profits tax return for the fiscal period ended January 31, 1919, the Commissioner of Internal Revenue determined the plaintiff's total tax liability for that period to be $225,165.75 instead of $57,871.16 as returned, and in April, 1924, made a jeopardy assessment against the plaintiff for the difference of $167,294.59. No part of that additional assessment was paid, and on or about May 22, 1924, the plaintiff (fol. 15) filed a claim for abatement of the full amount thereof. The claim was thereafter allowed in full, as will hereinafter be related.

4. While the aforesaid claim for abatement was under consideration, and prior to its formal allowance, the Acting Deputy Commissioner of Internal Revenue addressed a letter to plaintiff under date of November 19, 1924, relating to the income tax liability of the plaintiff and its Massachusetts subsidiary company for the years 1919, 1920, and 1921, containing a schedule showing the manner in which the Internal Revenue Bureau had computed the tax for the plaintiff's fiscal year ending January 31, 1919, and a total overassessment of $178,161.02, from which a deduction was made of $10,866.43, leaving the amount overassessed for said fiscal year at $167.294.59.

In connection therewith it was further stated in explanation of the deduction:

> "Inasmuch as the provisions of section 281 of the revenue act of 1924 have not been complied with regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 can not be allowed."

The plaintiff was informed that a certificate of overassessment would be issued through the office of the collector of internal revenue for its district and would be applied by that official in accordance with the provisions of section 281 (a) of the revenue act of 1924.

The Commissioner of Internal Revenue subsequently allowed in full the plaintiff's claim for abatement of the additional 1919 assessment of $167,294.59 hereinbefore referred to, and duly issued and scheduled to the collector of internal revenue a certificate of overassessment, No. 715402, in the plaintiff's favor for the said sum.

5. On December 11, 1926, Arthur B. Hyman, of Paskus, Gordon & Hyman, counsel for the plaintiff, addressed the following letter to C. R. Nash, assistant to the Commissioner of Internal Revenue:

> "Under date of November 19th, 1924, you determined an apparent deficiency in tax against the above-named company for the years ended January 31st, 1918 to 1921, inclusive. Additional taxes were found to be due in the years 1918, 1920, and 1921. In the year 1919 you found an overpayment of tax in the sum of $10,866.43 (p. 5, Schedule 10). You certified that inasmuch as section 281 of the revenue act of 1924 had not been complied with, the amount which would otherwise have been refundable—that is, $10,866.43—could not be refunded.
>
> Subsequently, under date of May 16th, 1925, you wrote to the taxpayer as follows:
>
> > 'An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent over-assessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office.'
>
> On May 22nd we wrote to you as follows (fol. 16):

'J. G. Bright, Esq., Deputy Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: In accordance with your request, we enclose you herewith waiver.'

Since that time we have heard nothing further from you and there has been no refund made to the taxpayer.

In this connection we desire particularly to emphasize the fact that you yourself discovered the overpayment of taxes for the year in question in connection with the audit of the taxpayer's return. It is your custom in such cases to make immediate refund, that is to say, if there are available appropriations for that purpose. In your letter no suggestion was made that anything further was necessary than the filing of the waiver, which was very promptly done.

A protest was filed by the taxpayer covering the year in question and a certificate of overassessment, No. 715402, Schedule No. 14872, was issued.

It goes without saying, of course, that your office desires that every taxpayer should be accorded that to which he is entitled, and we presume, therefore, that you will see that such a disposition is made of this case."

6. The waiver referred to in the finding next preceding was received by the Bureau of Internal Revenue on May 23, 1925, and accepted in writing by the commissioner.

7. On February 9, 1927, C. R. Nash, assistant to the Commissioner of Internal Revenue, addressed the following letter to counsel for the plaintiff:

"Further reference is made to your letter dated December 11, 1926, relative to the income-tax account of Bonwit Teller & Company, New York, New York, for the fiscal year ended January 31, 1919.

In this connection you are advised that, in order that the allowance of the overassessment may be made you are requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the

adjustment, making reference in your reply to IT:C:CC:3:OTA."

On February 17, 1927, the following letter was sent to Mr. Nash:

"In accordance with your letter of February 9th, 1927, we enclose herewith for filing claim for refund in the sum of $10,866.43, of Bonwit Teller & Co., on Form 843."

8. The plaintiff's claim for refund of $10,866.43 made on Form 843 was received by and duly filed in the Bureau of Internal Revenue on or about February 19, 1927. The plaintiff alleged that it believed its application for refund should be allowed "for the reasons stated in letter of C. B. Allen, acting deputy commissioner, dated November 19, 1924, containing the symbols IT:CR:A:JML—addressed to the taxpayer, a copy of which is hereto annexed and made a part hereof."

9. On or about February 5, 1927, H. B. Robinson, head of the consolidated returns audit division of the Income Tax Unit, approved and recommended for allowance a proposed certificate of overassessment, No. 990988, showing overassessment and overpayment of $10,866.43 under the plaintiff's original income-tax return for the fiscal year ended January 31, 1919. The record of the case was then checked (fol. 17) in the claims control section of the clearing division, to determine whether the plaintiff had filed a claim for refund prior to the expiration of the period of limitation applicable thereto. It was there determined with the approval of Mr. W. T. Sherwood, then head of the clearing division and now Assistant Deputy Commissioner of the Income Tax Unit, that the documents on file, which included the bureau's audit letter of November 19, 1924, the bureau's letter to plaintiff of May 16, 1925, inviting a waiver and the reply made by plaintiff's counsel

dated May 22, 1925, enclosing and filing the suggested waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

10. The letter dated May 22, 1925, returning the waiver properly executed by the plaintiff, which had been sent to it by the commissioner, was received and filed by the Bureau of Internal Revenue on May 23, 1925. The Bureau of Internal Revenue indorsed upon the letter returning the waiver as follows: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan." This indorsement was not dated. A further indorsement appears upon this letter as follows: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen. 4/4/27."

On February 5, 1927, the bureau executed another certificate of overassessment for $10,866.43 and the following certifications appear upon the margin of the bureau's record copy of overassessment:

> "Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27.
>
> Claim for refund filed May 23, 1925, waiver filed May 23, 1925.
>
> This C. of O. approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

11. The Commissioner of Internal Revenue thereafter allowed the plaintiff's claim for refund in the amount of $10,866.43 and on or about March 8, 1927, duly approved and scheduled to the collector of internal revenue a certificate of overassessment, No. 990988, in the plaintiff's favor, and on or about May 12, 1927, caused the original certificate to be delivered to the plaintiff. A copy of the said certificate of overassessment is annexed to the petition of the plaintiff as its Exhibit A and is made a part hereof

by reference. The collector of internal revenue after receiving the certificate of overassessment, certified the same as an overpayment by the plaintiff for its fiscal year ended January 31, 1919. He thereafter credited $9,846.06 of the amount allowed on the schedule against the additional tax assessed for 1917, referred to in Finding 2 hereof, and a check for $1,462.99, which included the balance of the overassessment of $1,020.37 and interest thereon in the amount of $442.62, was subsequently issued in favor of the plaintiff. The plaintiff has never presented said check for payment but has held it in its possession and has offered to apply it upon the claim involved herein if the defendant so desired and agreed, and the plaintiff has protested against the application of any part of this refund upon its tax for the year 1917 on the ground that said tax was barred by the statute of limitations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 282.

BONWIT TELLER & COMPANY, *Petitioner*,

against

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONER.

ARTHUR B. HYMAN,
Attorney for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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REPLY BRIEF FOR PETITIONER.

Two points are discussed in the brief for the United States. They are stated as follows:

1. As no claim for refund was filed prior to April 1st, 1926, the Commissioner had no authority to allow the petitioner's claim.
2. Even if the Commissioner's allowance was authorized, this suit is barred by lapse of time.

It is obvious that the first point begs the principal question presented in petitioner's brief. It will not do to say, as the United States has said, that the Commissioner had no authority to allow the petitioner's claim, "because no claim for refund was filed prior to April 1st, 1926." The fact that such a claim was filed prior to April 1st, 1926, was in fact and of necessity determined by the Commissioner of Internal Revenue and was the basis of his allowance. It is attempted by a choice of words to transform and disguise the real question at issue. It cannot, however, be denied that a claim for refund was made, nor that it was filed prior to April 1st, 1926, and that when perfected afterwards at his request by the use of his prescribed form it was satisfactory to him. To say, therefore, that no claim for refund was filed, is but masking the contention of the United States that, upon the facts before him, the Commissioner should have reached a different conclusion and should have denied the claim for refund. Thus it is that the government seeks to review and reverse his action.

The main question must therefore be hurdled by the United States, before it is in a position to discuss the facts.

The Commissioner of Internal Revenue Acted Within the Scope of His Authority in Allowing the Claim for Refund.

If as we contend, the Commissioner alone is vested with exclusive authority to determine these questions on behalf of the United States, and if that determination in favor of the taxpayer is followed by a certifi-

cate of the allowance and the liability of the United States becomes fixed, and the claimant's right to payment established, clearly the details of what took place in the office of the Commissioner are utterly immaterial, and are of no further interest in any judicial proceeding to recover upon the allowance. This view has been precisely expressed in United States v. Kaufman, 96 U. S. 567, and United States v. Savings Bank, 104 U. S. 728, and Bank of Greencastle's case, 15 Ct. Cl. 225, cited and quoted from in the main brief.

The learned counsel for the government contend that United States v. Kaufman and United States v. Savings Bank hold that the allowance by the Commissioner creates an account stated and evidence of an implied contract upon which the taxpayer may sue the United States only when he acts *"with authority"*, and that the Bank of Greencastle's case and Woolner v. United States are to the same effect. We have no disposition to quarrel with that contention, for clearly he acted with authority in determining that the petitioner had over-paid the tax and was entitled to a refund thereof. The Government's contention is without point, unless it be shown that some other officer of the government was vested with the authority in question, or that the Commissioner was not empowered.

It will be noted that in the brief for the United States, the question of the conclusiveness of the Commissioner's determination and its exemption from review, and the questions of fact which were determined by the Commissioner are discussed together, although the consideration of the second question is not reached until the first has been disposed of. Indeed, as we pointed out before, the government

seems to assume the right to review the action of the Commissioner and discusses the propriety of his determination as if the other question had not first to be surmounted.

The Exact Form of a Claim Allowed by the Commissioner is Immaterial. It is Sufficient if He is Reasonably Apprised of the Grounds Therefor.

We pass now to the argument of the United States in support of its contention that the Commissioner should not have allowed the petitioner's claim. It does not survive analysis, nor is it supported by authority. It was said in the Court of Claims that no sufficient informal claim was filed with the Commissioner, and that therefore, it could not be perfected by a formal claim. It is urged here that neither the statutes nor the regulations provided for an informal claim and that a literal compliance with the statutory requirements may be insisted upon by the United States. We have pointed out that there are no statutory requirements governing a claim for refund. The statute says that over-paid taxes may be refunded within certain definite periods, *if a claim therefor is filed within certain limits of time.* Administratively, certain formalities are demanded. These are prescribed in the interest of orderly procedure and to enable the Commissioner to intelligently pass upon the claims. As pointed out in the petitioner's main brief, under Treasury Decision 4266, approved March 22nd, 1929, not only informal, but defective claims were held to be sufficient to toll the statute of limitations, if perfected by formal claims filed prior to April 1st, 1929. Informal claims have long been received and recognized and that such informalities

may be waived and a formal claim dispensed with, is no longer open to question since the decision of this Court in Tucker v. Alexander, 275 U. S. 228.

Upon this point, we cited in the main brief, Artmetal Construction Co. v. United States, and Zeller v. United States (pp. 27, 28). Since the preparation of our main brief these cases have been reversed by the Circuit Court of Appeals for the Second Circuit. An examination of the opinion of that Court will readily disclose that the reversal does not militate against the petitioner's position in regard to the propriety of the claim. In Artmetal Construction Co. v. United States, in which the main opinion was written (Standard Federal Tax Service, Volume 3, par. 9104), it is pointed out that the claim for refund was for $1.00, and that no ground for the refund was set up in the claim.

The Court, in discussing the facts, pointed out that the first indication of the character of the claim occurred after the statute had run; that on July 6th, plaintiff protested against an additional assessment and filed a brief in opposition demanding a special assessment for reasons then set forth, and the Court said, "it may be assumed that this was an adequate claim for refund on that ground, if in season."

The Court also points to the hopeless disagreement of the Courts on the subject referring to Felt & Tarrant v. United States, 37 Fed. (2d.) 977, recently argued in this Court where language as general as in the case then under consideration by the Circuit Court of Appeals, was held sufficient.

No purpose is to be served by discussing the divergent views of the various Courts as to what constitutes a claim that may be treated as an informal claim

and one which is insufficient for any purpose. It is recognized by all, that the primary purpose is to advise the Commissioner of the grounds of the claim. Not informality in the manner of statement, but the absence of any statement of claim was the subject of condemnation in Artmetal Construction Co. v. United States, *supra*, and cases of similar import. The instant case is far removed from the scope of such condemnation. The fact of over-payment of tax for 1919 had been determined in 1924, and the right to the refund conceded, except for the bar of the statute. The Commissioner was fully cognizant of the grounds of the plaintiff's claim and admitted their propriety. Unfortunately he had waited to determine the petitioner's liability until the statute had run.

It is asserted by the learned counsel for the government that when the amendment of 1925 was passed enabling the Commissioner to make the refund, there was no claim for such refund on file. This is clearly an error and cannot be reconciled with the Commissioner's letter of May 16th, in which he wrote to the taxpayer as follows:

> "An examination of your income tax return for the year ending January 31st, 1919, discloses an apparent over-assessment of tax for the year. It appears that the over-assessment cannot now be allowed, due to the limitation of time for allowance thereof, provided by Section 281 of the Revenue Act of 1924, unless an income and profits tax waiver is filed on or before June 15th, 1925."

If there was no claim pending and the case had been closed in November of 1924, why this letter?

It is said also by the government that the authority

or right of the Commissioner to grant the petitioner's claim is subject to review in this action and that its position is supported by Sections 608 and 610 of the Revenue Act of 1928. The act of 1928 was passed after the allowance of the claim in the instant case, and can have no application since it deals only with refunds made after its enactment. It is therefore fruitless to discuss its effect. The Commissioner has granted the refund. If the United States is of opinion that it may recover after payment that issue can be appropriately raised and met. It is not pertinent here.

We might reiterate that if such an action should be brought, the petitioner would at least be advised of the Government's attitude and contentions and would be in position to compel their proper presentation, and to meet them appropriately. It would not, as here, under a general traverse, be confronted with the necessity of proving the propriety of a determination upon which it bases its cause of action.

This Suit is One Upon a Claim Allowed by the Commissioner and is Not Barred by the Statute of Limitations.

The argument of Government Counsel on their second point is ingenious. It is said as to the petitioner's first cause of action, that it is one to recover taxes and that under Section 1113 of the Revenue Act of 1926 it is barred because not brought within five years after the payment of the tax and that, as to the second cause of action, while in form to recover upon an account stated or implied contract, it is, notwithstanding, brought for the recovery of taxes.

Section 1113 provides that no suit for the recovery of taxes shall be maintained unless there shall have been first filed with the Commissioner of Internal Revenue a claim for credit or refund. It is admitted by Government Counsel and Section 284 of the Revenue Act of 1926 makes it quite clear that once a claim for refund is filed, the Commissioner may take whatever time he chooses to pass upon it and the taxpayer may or may not await his pleasure. He may not sue within six months after the claim is filed unless the commissioner disallows the claim within that period. He may sue if he chooses after the expiration of six months without waiting for a determination by the Commissioner or he may await the determination of the claim by the Commissioner. The import of the Statute is that if the Commissioner does not determine the claim and the taxpayer chooses to sue without awaiting his determination, he must bring the action within five years from the payment of the tax. If he chooses to await the determination, he may bring the action at any time within two years after such determination. It seems clear that Section 1113 deals only with claims for refund which are either disallowed or upon which no action has been taken by the Commissioner and has no application to the instant case. Naturally there was no occasion to deal with a claim for refund once allowed. In the first place, a suit upon an allowed claim for refund could hardly be contemplated. Such suits are rare and result from misconceptions such as where an accounting officer of the Government refuses to honor the certificate of allowance of the Commissioner. Further, once the claim has been allowed, a new cause of action is created.

United States v. Kaufman, 96 U. S. 567.
United States v. Savings Bank, 104 U. S. 728.
Bank of Greencastle's case, 15 Ct. Cl. 225.

and others cited in the main brief.

However an examination of the petition for recovery in the case at bar shows that even the first cause of action while stating that the subject matter involved was income and profits taxes, based the right of recovery upon the allowance by the Commissioner of the claim for refund. The first and second causes of action are similar in their import but are stated in different form as is quite proper.

The United States appreciates that its contention is adversely disposed of in the Kaufman, East River Savings Bank and Bank of Greencastles cases if the action be upon an implied contract or an account stated but urges that it is nevertheless one for the recovery of taxes and therefore barred because not brought within five years from the time the tax was paid. One might as well say in an action on a promissory note that it is in reality one for the recovery for goods sold if such was the consideration for the note. The fallacy of all such argument becomes manifest when consideration is given to the fact that the amendment of 1925 perpetuated by the provisions of the Act of 1926 authorized the allowance by the Commissioner of the claim for refund filed before April 1, 1926, provided a waiver is filed. This would be approximately seven years after the tax has been paid and thus we find the Government contending that although the Commissioner is authorized, and in effect, directed to pay back all taxes erroneously

assessed or collected, seven years after payment, the taxpayer cannot sue to recover if he allows the claim and an accounting officer of the Government refuses to honor the allowance by the issuance of an appropriate check or if when suit is brought upon such an allowance in the court of claims, the defense of the statute of limitations is pleaded. Pursuing that line of reasoning further, it becomes apparent that if the Commissioner disallowed the claim for refund, the taxpayer could recover. This reduces the argument to absurdity.

It is clear that whatever may be said of the first cause of action, the second is upon the account stated and is not barred until 6 years after the cause of action accrued. The petition was filed in the Court of Claims in December of 1927, the year of allowance of the claims.

A demand for excessive interest cannot change the character of the action.

In the course of its discussion of its second point, counsel for the United States, refers to our reliance upon Peerless Paper Box Company v. Routzhan, 22 Fed. (2d) 459. Our citation of that case was upon a totally different point and has no application to the claim of the government that this suit was barred by statute.

The case of Jenkins Steamship Company v. Routzhan (cited p. 13 of the Government's brief) in which it is said the government's contention in the instant case is sustained, is clearly not in point and the Peerless Paper Box Company v. Routzhan was therein distinguished. The report on the case in Prentice Hall Tax Service is very meager, but it is said in the opinion that counsels claim that the action is to re-

cover for money ordered refunded on account of an over-payment of taxes for another year, is not borne out by the averments of the petition.

In William J. Friday & Company, Inc. v. United States (District Court for the Western District of Pennsylvania, Prentice Hall, Par. 615) relied upon by the government here, it appears that the action was not brought upon an allowance of a claim for refund as in the instant case. While it is true that in that case the Commissioner did determine that an over-payment had been made, he had not allowed a claim for refund therefor, since none of any character appears to have been filed.

The Court on demurrer by the United States, held that the action being for the recovery of taxes, could not be maintained without averments in the statement of claim that claim for refund had been filed as required by Section 1113 of the Revenue Act of 1926. The statute of limitations was not involved. The sufficiency of the complaint only was involved.

We respectfully contend that the action of the Commissioner in allowing the refund in this case is binding and conclusive upon the United States not having been in any appropriate action impeached for fraud or mistake; that the Court of Claims was without power or authority to review and reverse the Commissioner's determination in the absence of such impeachment; that if the determination is open to review, the reversal was improper and judgment should have been directed for the Petitioner.

Respectfully submitted,

ARTHUR B. HYMAN,
Attorney for Petitioner.

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No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1930

BONWIT TELLER & COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the issuance of the writ in this case.

OPINION BELOW

The opinion of the Court of Claims (R. 18) is reported in 39 F. (2d) 730.

JURISDICTION

The judgment sought to be reviewed was entered on April 14, 1930. (R. 30.) The petition for certiorari was filed on July 9, 1930. (R. 30.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

1. Whether the determination of the Commissioner of Internal Revenue that a sufficient claim for refund of taxes had been filed is reviewable by the courts at the instance of the United States, and

if reviewable, whether the particular facts of this case establish that a claim for refund was filed.

2. Whether the provisions of Section 1113 (a) of the Revenue Act of 1926 are applicable to a case in which the Commissioner has allowed a claim for refund and has approved and scheduled to the Collector of Internal Revenue a certificate of overassessment.

STATUTE INVOLVED

Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides as follows:

> Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commis-

sioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit or proceeding relates. The Commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."

STATEMENT.

On July 14, 1919, the petitioner filed its income and profits tax return for the fiscal year ending January 31, 1919, and paid the taxes shown thereon on July 14, 1919, and December 13, 1919. (R. 13.) The Commissioner of Internal Revenue found and on November 19, 1924, advised the petitioner that the tax paid on this return was $10,866.43 in excess of the correct tax liability. (R. 14.) The period of limitations then in force for the filing of a claim for refund had expired. By the Act of March 3, 1925, c. 435, 43 Stat. 1115, the period was extended to permit a refund or credit if a claim therefor was filed prior to April 1, 1926, upon certain conditions not here material.

The taxpayer, having been advised of the overpayment, and having been furnished by the Commissioner a form of waiver for filing, on May 23, 1925, filed the waiver which was accepted by the Commissioner. (R. 15.) No formal claim for refund was then filed. Some official of the Bureau

of Internal Revenue marked the letter returning the waiver as follows (R. 17):

> Inferential demand for the refund upon basis of the schedule sent taxpayer under date November 19, 1924 (IT:CR:A:JML). Rules and Regulations, Mulligan.

On February 9, 1927, the Commissioner of Internal Revenue advised the petitioner that a claim for refund on proper form should be filed. (R. 15.) On February 19, 1927, such a formal claim was filed. (R. 16.)

A certificate of overassessment for $10,866.43 was prepared and on March 8, 1927, the Commissioner allowed the claim and approved the certificate of overassessment. (R. 17.) The Collector, however, credited $9,846.06 of the allowed amount against an unpaid assessment for the year 1917. (R. 17.) A check was issued to the petitioner for the balance, with interest. (R. 17.) The petitioner protested against this credit upon the ground that the collection of the unpaid assessment for 1917 was barred, and accordingly, it did not cash the check, but held it and offered to apply it against the present claim. (R. 17.)

The petitioner thereupon brought this suit, claiming $10,866.43. The respondent answered and counterclaimed for the amount of the payment covered by the check upon the ground that it constituted an unauthorized refund of money, as no claim for refund had been filed within the time prescribed by law. (R. 10, 11.) The court dismissed the petition and the respondent's counterclaim. (R. 30.)

DISCUSSION

I

The respondent at all times in this suit conceded that the credit of $9,846.06 against the 1917 tax was unwarranted as a collection out of time.

In the court below the Government contended that the overpayment in dispute, including the credit, was never due the taxpayer because no claim for refund was ever filed. This contention was sustained by the majority, three judges, of the court; but two judges dissented on the ground that the determination of the Commissioner that the papers filed were sufficient to constitute a claim for refund was not reviewable at the instance of the Government and on the additional ground that the Commissioner's determination was not erroneous.

There is no suggestion of fraud or mistake in this case. We submit that the reasoning of this Court in *United States* v. *Kaufman*, 96 U. S. 567, *United States* v. *Savings Bank*, 104 U. S. 728, and *Tucker* v. *Alexander*, 275 U. S. 228, if applicable to the situation in the instant case, would support the dissenting opinion, and that the question whether that reasoning is applicable is of sufficient doubt to warrant a review by this Court.

II

Although the Government did not contend in the court below that the action was barred by the provisions of Section 1113 (a) of the Revenue Act of 1926 (p. 2, *supra*), it is settled that the limitation

of such a statute goes to the jurisdiction of the court, and consequently this point may be raised at the present time. *Finn* v. *United States,* 123 U. S. 227; *Arnson* v. *Murphy,* 115 U. S. 579, 584; *Arnson* v. *Murphy,* 109 U. S. 238, 243. The tax here was paid in 1919 (R. 13), and the instant suit was not brought until 1927, more than five years after the payment of the tax (R. 5): Section 1113 (a) seems to be applicable; and if so, it would bar the present action. We are not aware of any case in which the question as to the applicability of this section to a situation similar to that involved in the case at bar has been discussed, but we are advised that this point will be raised in many cases which are now pending.

CONCLUSION

For the reasons stated above, we do not oppose the issuance of the writ in this case.

Respectfully submitted.

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SEPTEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Office Supreme Court, U.
FILED
MAR 11 1931
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1930

BONWIT TELLER & COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 18) is reported in 39 F. (2d) 730 and 69 C. Cls. 638.

JURISDICTION

The judgment of the Court of Claims was entered on April 14, 1930. (R. 30.) The petition for certiorari was filed July 9, 1930 (R. 30), and was granted October 13, 1930 (R. 31). The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a taxpayer can recover an overpayment of tax as to which the Commissioner of Internal Revenue has approved a certificate of overassessment, in spite of the fact that no claim for refund was filed within the time required by statutes.

2. Whether Section 3226 of the Revised Statutes, as amended by Section 1113 (a) of the Revenue Act of 1926, applies to this suit.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra*, pp. 15–19.

STATEMENT

On July 14, 1919, the petitioner filed its income and profits tax return for the fiscal year ended January 31, 1919, and paid the taxes so returned on July 14, 1919, and December 13, 1919. (R. 13.) The Commissioner of Internal Revenue on November 19, 1924, advised the petitioner that the tax paid on this return was $10,866.43 in excess of the correct tax liability. (R. 14.)

The period of limitations then in force for the filing of a claim for refund had expired, and no claim had been filed. By the Act of March 3, 1925, c. 435, 43 Stat. 1115, the period was extended to permit a refund or credit if a claim was filed prior to April 1, 1926, and if a waiver was filed on or before June 15, 1925. On May 16, 1925, the officials

in the Bureau of Internal Revenue wrote to the taxpayer (R. 14–15):

> An examination of your income-tax return for the year ended January 31st, 1919, discloses an apparent overassessment of tax for the year. It appears that the overassessment can not now be allowed, due to the limitation of time for allowance thereof, provided by section 281 of the revenue act of 1924, unless an income and profits-tax waiver is filed on or before June 15th, 1925, as provided by an act of Congress dated March 3, 1925, amending section 281 E of the revenue act of 1924. Two waiver forms are, therefore, enclosed in order that you may, if you desire, execute and forward one of the forms to this office.

Thereupon the taxpayer executed and filed the waiver, and the Bureau received and accepted it on May 23, 1925. (R. 15.) Although there is no express statement in the findings that no claim for refund was filed at that time, it appears that everything that was done by the parties is narrated in the findings, and it is obvious that nothing was filed by the taxpayer except the waiver and the letter stating that the waiver was enclosed. (See R. 14–17.) Some official of the Bureau of Internal Revenue marked the taxpayer's letter inclosing the waiver as follows (R. 17):

> Inferential demand for the refund upon basis of the schedule sent taxpayer under date

of November 19, 1924 (IT:CR:A:JML). Rules and Regulations. Mulligan.

Nothing more was done until December 11, 1926 (after the time set by the statute for filing a claim for refund), when the taxpayer wrote a letter requesting payment of the refund. (R. 14.) On February 9, 1927, the Commissioner advised the petitioner that a claim for refund on proper form should be filed. (R. 15.) On February 19, 1927, such a formal claim was filed. (R. 16.) A certificate of overassessment for $10,866.43 was prepared and on March 8, 1927, the Commissioner allowed the claim and approved the certificate of overassessment. (R. 17.)[1] The Collector credited $9,846.06 of the allowed amount against an unpaid assessment for the year 1917. (R. 17.) A certificate of overassessment, together with a check for the balance with interest, was delivered to the petitioner on May 12, 1927. (R. 6, 17.) The petitioner protested against the credit upon the ground that the collection of the unpaid assessment for 1917 was barred and accordingly it did not cash the check, but held it and offered to apply it against the present claim.

On December 27, 1927, the petitioner brought this suit claiming $10,866.43. The respondent an-

[1] At the time in question the procedure in force under the Revenue Act of 1926 was different from that discussed by this Court in the case of *Swift & Co.* v. *United States*, No. 56, October Term, 1930, decided February 2, 1931. It is, therefore, conceded that the claim was allowed on March 8, 1927. See Section 1116 (b) (2) of the Revenue Act of 1926.

swered and at a much later time filed a counterclaim for the amount of the payment covered by the check upon the ground that it constituted an unauthorized refund of money, as no claim for refund had been filed within the time prescribed by law. (R. 10–11.) The court dismissed the petition and the respondent's counterclaim. (R. 30.)

SUMMARY OF ARGUMENT

1. The taxpayer was entitled to a refund only if claim therefor was filed either on or before April 1, 1926, or within four years from the time the tax was paid. (Act of March 3, 1925, p. 15, *infra*.) No such claim was filed within that time. The taxpayer contends that the Government can not challenge the action of the Commissioner in allowing the claim in the absence of proof of "fraud or mistake," but the requirement would seem to be jurisdictional and one which the Commissioner can not waive. Compliance with the statutory requirement is not excused by the fact that the taxpayer was not requested to file a claim for refund, but only a waiver, which it did file.

2. Even if the Commissioner's allowance of the claim must stand, the taxpayer can not recover, as this suit was not brought within five years from the date of the payment of the tax (§ 3226 R. S., as amended by § 1113 of the Revenue Act of 1926, pp. 15–16, *infra*). The clause in this statute permitting suit "within two years after the disallowance" of a claim for refund has no application here, since in

the instant case the claim for refund was not disallowed.

ARGUMENT

I

AS NO CLAIM FOR REFUND WAS FILED PRIOR TO APRIL 1, 1926, THE COMMISSIONER HAD NO AUTHORITY TO ALLOW THE PETITIONER'S CLAIM

The petitioner's return was filed on July 14, 1919, and its taxes were paid by December 13, 1919. The four year general limitation for filing a claim for refund under Section 3228 of the Revised Statutes expired on December 13, 1923; and the five year period provided in Section 252 of the Revenue Act of 1921 and Section 281 (f) of the Revenue Act of 1924 expired on July 14, 1924. At the latter date no claim for refund had been filed and the Commissioner had no authority to make a refund.

The Act of March 3, 1925 (*infra*, p. 15), amending Section 281 (e) of the Revenue Act of 1924, provided—

> If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid.

In May, 1925, the Bureau sent a letter to the petitioner stating that an overassessment could not be allowed unless a waiver was filed. The Bureau

made no specific request for a claim for refund, although it did mention the above act, which required the filing of such a claim before April 1, 1926. The petitioner filed such a waiver before June 15, 1925, but neglected to file a claim for refund before April 1, 1926. The express condition of the only statute which could possibly have permitted the refund, namely, "if claim therefor is filed * * * before April 1, 1926," was never satisfied. After April 1, 1926, the Commissioner had no authority to make a refund or pass favorably on a refund claim.

At some time which does not clearly appear but which apparently was after April 1, 1926, the Commissioner's office made indorsements on the taxpayer's letter which accompanied the waiver, treating it as a claim for refund. On February 19, 1927, the petitioner filed a claim for refund of these taxes, and on March 8, 1927, this claim was allowed by the Commissioner. We submit that the Commissioner had no authority to allow the claim.

The petitioner contends that an "informal claim for refund" was filed within time and that it was perfected after the statute had run. Relying upon the presumption of propriety attaching to the certificate of the Commissioner, it argues that in the absence of positive finding that an informal claim for refund was not filed it must be presumed that some kind of a claim was filed. Although there is no categorical statement in the findings that an in-

formal claim for refund was not filed, the findings obviously narrate everything that was done, and it appears from them (particularly from the letter of counsel for the taxpayer dated December 11, 1926) that the taxpayer did nothing more than to reply to the Bureau's request for a waiver by sending a waiver and a covering letter which contained no mention of a claim for refund.

A claim for refund is a formal prerequisite to suit. It is established that literal compliance with this statutory requirement may be insisted upon by the United States. *Rock Island Railroad Co.* v. *United States*, 254 U. S. 141. There is a dual purpose in the requirement that claims for refund be filed. One well recognized purpose is to advise the Commissioner of the grounds asserted by the taxpayer for the claim for refund so as to give the authorities opportunity to correct errors administratively and avoid litigation. Another purpose is to extend the time within which the Commissioner may make the refund. Without a claim for refund the Commissioner's authority to act is limited as to time by statute. Upon the filing of a claim for refund within the limited period, the Commissioner's authority is extended until his final decision on the claim. We submit that the authority of the Commissioner to waive compliance with the statute requiring the filing of the claim for refund is limited to waiver of the sufficiency of claims properly filed.

In the absence of any claim, the Commissioner has no jurisdiction to allow an overassessment.[2]

In the instant case neither of the documents filed within the statutory period—the waiver and letter accompanying it—requested the repayment of taxes. We submit that the Commissioner was not authorized to treat them as a claim for refund. His "allowance" should not be considered to constitute a basis for this suit. The two cases most strongly relied upon by the petitioner on this point, *Zeller* v. *United States*, 35 F. (2d) 870, and *Art Metal Construction Co.* v. *United States*, 35 F. (2d) 379, have been reversed by the Circuit Court of Appeals for the Second Circuit in opinions handed down on February 2, 1931. See also *United States* v. *Felt & Tarrant Mfg. Co.*, No. 116, October Term, 1930, recently argued before this Court.

But the petitioner contends that even if no claim for refund was filed in time the courts may not review the Commissioner's act in allowing the claim. *United States* v. *Kaufman*, 96 U. S. 567, and *United States* v. *Savings Bank*, 104 U. S. 728, are cited in support of this position. Those cases hold that when the Commissioner *with authority* allows a claim for refund, that allowance is an

[2] In *Tucker* v. *Alexander*, 275 U. S. 228, which is relied upon by the taxpayer, the Court held that the Government during the trial of a case could waive the insufficiency of a claim for refund which had been filed. But there a claim for refund had been filed and the stipulation which operated as the waiver was executed before the statute of limitations had run.

account stated and evidence of an implied contract on which, within the proper period of time, the taxpayer may sue the United States. In the instant case the unauthorized acts of the Commissioner should not bind the United States on any such theory of implied contract. Similarly the earlier decisions of the Court of Claims relied on by the petitioner, *Bank of Greencastle* v. *United States*, 15 C. Cls. 225, and *Woolner* v. *United States*, 13 C. Cls. 355, both recognized that the Commissioner must act within the scope of his authority. The contention of the petitioner is apparently that the agent's decision on the scope of his authority is final. We submit that the Commissioner has no such uncontrolled power to bind the United States. If, in the words of the statute, no "claim therefor is filed * * * before April 1, 1926," then no "credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made."

The Government's position in the instant case is supported by Sections 608 and 610 of the Revenue Act of 1928 (*infra*, pp. 16–17). Those sections contemplate review of the Commissioner's action in just such a case as this. Should the Commissioner now refund the money sought by the petitioner, the United States could under Section 610 institute a suit to recover that refund on the ground that under Section 608 the refund was erroneous because made "after the expiration of the period of limitation for filing claim therefor" where within such period no claim was filed.

II

EVEN IF THE COMMISSIONER'S ALLOWANCE WAS AUTHORIZED THIS SUIT IS BARRED BY LAPSE OF TIME

Should it be determined that a sufficient claim for refund was filed in time so that the Commissioner's action in allowing it was authorized, nevertheless we question whether recovery should be allowed in view of the provisions of Section 3226 of the Revised Statutes, as amended by Section 1113 of the Revenue Act of 1926 (*infra*, pp. 15–16). That statute provides:

> No suit or proceeding * * * for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates.

The petitioner paid its income and profits taxes for the fiscal year in question on July 14, 1919, and December 13, 1919. The five-year period expired on December 13, 1924. This suit was begun on December 27, 1927. The clause permitting suit "within two years after the disallowance" of a claim for refund has no application here, since in the instant case the claim for refund was not disallowed.

The petitioner does not allege any disallowance of any claim for refund within the two-year period, but instead contends that this suit is not subject to

the limitations of Section 3226. It argues that this is not a proceeding to recover taxes, but rather an action on an implied contract. It urges that the allowance of its "inferential claim" by the Commissioner was an account stated upon which the United States is liable, and cites *United States* v. *Savings Bank*, 104 U. S. 728, *supra*, in support of its position. But in that case no defense was made on the basis of the statute of limitations. And the suit was brought within two years after the appeal was allowed by the Treasury Department. This was within the period of time allowed for suits to recover taxes by Sections 3226 and 3227 of the Revised Statutes as they then existed (*infra*, pp. 18–19).

Similarly the instant suit may be on an account stated, if it be assumed that the Commissioner had authority to allow the claim for refund. But it is also a suit for the recovery of taxes,[8] and on such a ground the United States may be sued only as it has consented to be sued, namely within the limited period of time prescribed by Section 3226.

The petitioner also relies upon *Peerless Paper Box Mfg. Co.* v. *Routzahn*, 22 F. (2d) 459 (N. D.

[8] That this is the character of this proceeding is indicated by the prayer for interest in the petition in the court below (R. 7) seeking interest from July 10, 1919, the date of the alleged overpayment. On the account stated theory no interest would be allowable against the United States (Jud. Code, sec. 177; U. S. C., title 28, sec. 284); if it were allowable, it would run only from March 8, 1927, the date of the allowance and accrual of any contractual right of action.

Ohio). In that case a refund was allowed but was applied in payment of a barred tax for 1917. A claim for the refund of the 1917 tax so paid was filed and rejected, and the suit was brought, as permitted by Section 3226, within two years of the disallowance of that claim for refund. The decision was that the application of a credit in payment of a barred tax is an illegal collection. In the instant case it is conceded that the application of the credit was void, but the Government maintains that the suit was not brought in time.

In *Jenkins Steamship Co.* v. *Routzahn* (N. D. Ohio, reported in Paragraph 1638 of the 1930 Prentice Hall Federal Tax Service) another judge in the same court which decided the *Peerless Paper Box Co.* case held that a suit to recover a tax paid out of time by the application of a refund as a credit was barred by the limitations of Section 3226, as it was not brought within five years from the date of payment of the tax and no claim for the refund of the tax paid by the credit was filed.

In *Wm. J. Friday & Co., Inc.,* v. *United States* (W. D. Pa., decided February 2, 1931, reported in Paragraph 615 of the 1931 Prentice Hall Federal Tax Service) it was held that Section 3226 barred recovery.[4] There the Commissioner scheduled an

[4] See also *Moses* v. *United States*, 43 F. (2d) 653 (E. D. N. Y.), where the same point was raised and the court stated that the suit was one to recover an overpayment of taxes, although it held that it was barred by both Section 3226 and the ordinary six-year period from the accrual of the cause of action. Apparently a contrary view was taken in the

overpayment of 1919 taxes, the Collector credited part of it against a barred 1917 tax liability, and without filing a claim for refund the taxpayer sued more than five years after the 1917 tax had been paid by the application of the credit. The Government's demurrer was sustained. The case is authority that the suit was one for the recovery of taxes, and thus subject to the provisions of Section 3226, although the Commissioner had stated an account with the taxpayer and made an implied contract on behalf of the United States.

CONCLUSION

The decision of the court below is correct and its judgment should be affirmed.

Respectfully submitted.

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MARCH, 1931.

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opinion in *United Motor Corporation* v. *United States*, 44 F. (2d) 407, 409 (S. D. N. Y.), but the court's comments on this point were express *dicta*.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

STATUTES

The Act of March 3, 1925, c. 435, 43 Stat. 1115, provides:

> That subdivision (e) of section 281 of the Revenue Act of 1924 is amended by adding thereto two new sentences to read as follows: "If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid. If any such waiver so filed has, before the expiration of the period thereof, been extended either by the filing of a new waiver or by the extension of the original waiver, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either (1) within four years from the time the tax was paid, or (2) on or before April 1, 1926, in the case of credits or refunds relating to the taxes for the taxable years 1917 and 1918, or on or before April 1, 1927, in the case of credits or refunds relating to the taxes for the taxable year 1919."

Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides:

> Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credt has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Sections 608 and 610 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, provide:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim there-

for, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later.

Sections 3226 and 3227 of the Revised Statutes provided (during the litigation of *United States* v. *Kaufman* and *United States* v. *Savings Bank*, *supra*):

> SEC. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of [*the*] Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the Commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the Commissioner at any time within the period limited in the next section.
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> SEC. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court, unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the

preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section.

REGULATIONS

Article 1306 of Treasury Regulations 65, promulgated under the Revenue Act of 1924, provides:

> ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties, and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. In the case of the taxpayer's death, certified copies of the letters of administration or letters testamentary or other similar evidence must be annexed to the claim to show the authority of the administrator or executor. The affidavit may be made by the agent of the person assessed, but in such case a power of attorney must accompany the claim. Checks in payment of claims allowed will be drawn in the names of the persons entitled to the money and will be sent directly to the proper persons. The Commissioner has no authority to refund on equitable grounds penalties legally collected. As to claims for refund of sums recovered by suit, see article 1353.

Similar provisions are contained in Article 1352 of Treasury Regulations 69, promulgated under the Revenue Act of 1926.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 282.—October Term, 1930.

Bonwit Teller & Company, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[April 13, 1931.]

Mr. Justice Butler delivered the opinion of the Court.

This action was brought to recover the amount of an overpayment of income tax for the year ended January 31, 1919, as determined by the Commissioner of Internal Revenue and shown in his certificate, No. 990,988, issued to plaintiff May 12, 1927. The Government first filed a general traverse. But later, asserting lack of authority on the part of the Commissioner to make the determination and refund, it filed a counterclaim for the amount of a check sent plaintiff to pay the balance of the refund remaining after deducting a part to pay an additional tax assessed against it for the year ended January 31, 1917. That tax was then, as it is now conceded, barred by a statute of limitation. *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346. On special findings the court entered judgment dismissing plaintiff's complaint and the Government's counterclaim but gave the latter judgment for the cost of printing the record. 69 C. Cls. 638; 39 F. (2d) 730. On plaintiff's petition we granted a writ of certiorari. 282 U. S. —.

The court found:

Plaintiff is a corporation engaged in the business of selling merchandise at retail. Its fiscal year begins February 1. July 14, 1919, it filed its return for the year ended January 31, 1919, reporting an income tax of $57,871.16 which was paid, one-half July 14 and the balance December 13 following. Pending audit of the return, the Commissioner fixed plaintiff's total tax liability for that year at $225,165.75 and in April, 1924, made a jeopardy assessment for $167,294.59, the excess over the amount returned and paid. The plaintiff promptly filed a claim for abatement of the full amount of the additional assessment.

November 19, 1924, the bureau sent plaintiff a letter containing a schedule disclosing the computation of its tax for the year ended January 31, 1919, and showing a total overassessment of $178,161.02. From this amount there was deducted $10,866.43 found by the Commissioner to have been erroneously included in plaintiff's return and paid. The letter stated: "Inasmuch as the provisions of section 281 of the revenue act of 1924[1] have not been complied with [in] regard to the full amount of the above overassessment, a portion in the amount of $10,866.43 cannot be allowed". In accordance with that letter, the Commissioner allowed plaintiff's claim for abatement.

May 16, 1925, the bureau wrote plaintiff that an examination of its income tax return for the year ended January 31, 1919, disclosed an apparent overassessment, and that it could not then be allowed "unless an income and profits tax waiver is filed on or before June 15, 1925, as provided by an Act of Congress dated March 3, 1925, amending § 281 (e) of the Revenue Act of 1924.[2] Two waiver forms are therefore enclosed in order that you may, if you desire, execute and forward one of the forms to this office". Plaintiff executed the waiver and May 22, 1925, returned it with a

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[1]Section 281, 43 Stat. 301:

"(b) Except as provided in subdivision . . . (e) . . . no such credit or refund shall be allowed or made after four years from the time the tax was paid, unless before the expiration of such four years a claim therefor is filed by the taxpayer. . . .

"(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid.

"(f) This section shall not . . . (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920, if such claim is filed before the expiration of five years after the date the return was due."

[2]Act of March 3, 1925, 43 Stat. 1115, added to § 281 (e):

"If the taxpayer has, on or before June 15, 1925, filed such a waiver in respect of the taxes due for the taxable year 1919, then such credit or refund relating to the taxes for the taxable year 1919 shall be allowed or made if claim therefor is filed either on or before April 1, 1926, or within four years from the time the tax was paid."

letter stating: "In accordance with your request, we enclose you herewith waiver". On the following day the waiver was received and accepted in writing by the Commissioner.

December 11, 1926, counsel for plaintiff sent the bureau a letter which quoted the substance, as above given, of the letters of November 19, 1924, and May 16, 1925, and, in reference to the letter of May 22, 1925, said: "Since that time we have heard nothing further from you and there has been no refund made to the taxpayer." February 5, 1927, the head of the audit division approved and recommended for allowance the certificate of overassessment No. 990,988. The record of the case was checked to determine whether the plaintiff had filed a claim for refund prior to the expiration of the applicable period of limitation. And it was determined that the documents filed which included the audit letter of November 19, 1924, showing how the amount of the overpayment was ascertained, the letter of May 16, 1925, furnishing form of waiver, and the plaintiff's answer of May 22 following, enclosing the executed waiver, would be treated by the bureau as an informal claim for refund filed May 23, 1925.

Plaintiff's letter of May 22, 1925, bears an undated endorsement: "Inferential demand for the refund upon basis of the schedule sent taxpayer under date of November 19, 1924 . . . Rules and Regulations. Mulligan", and another dated April 4, 1927: "Approved by Mr. Mulligan and Mr. Sherwood for scheduling as is. O. Allen".

February 9, 1927, the bureau wrote plaintiff's counsel: " . . . in order that the allowance of the overassessment may be made, you are requested to file with this office a claim on the enclosed Form 843 setting forth the basis of the adjustment . . ." Accordingly plaintiff executed the form and thereon stated that the application should be allowed for the reasons shown in the audit letter of November 19, 1924, a copy of which was attached. And February 17, 1927, plaintiff returned the form with a letter saying: " . . . we enclose herewith for filing, claim for refund in the sum of $10,866.43 . . . on Form 843". The claim was received and filed in the bureau February 19; the Commissioner allowed the claim and on March 8 approved and scheduled to the collector the certificate of overassessment.

On the margin of the bureau's record copy appear the following certifications: "Waiver filed May 23, 1925. Informal claim for refund filed May 23, 1925, with waiver perfected by claim Form 843. (Signed) O. Allen, 3/4/27." "Claim for refund filed May 23, 1925, waiver filed May 23, 1925." "This C. of O. [certificate of overassessment] approved for scheduling as is by W. T. S. (Signed) O. Allen, 4/4/27."

The collector credited $9,846.06 against the additional tax assessed for the year ending January 31, 1917. May 12, 1927, the Commissioner caused the certificate, showing the deduction made by the collector, to be delivered to plaintiff with a check for the balance of the overassessment and interest, $1,462.99. Plaintiff objected to the application of any part of the refund against such additional assessment on the ground that the 1917 tax was barred and declined to accept the check in full settlement but offered to apply it in partial payment of the claim.

The Government, in support of the judgment below, insists that no claim for refund was filed by plaintiff prior to April 1, 1926, the time permitted by the Act of March 3, 1925, 43 Stat. 1115, and that therefore the Commissioner was without authority to allow the claim.

The provision involved amends § 281 (e) of the Revenue Act of 1924, 43 Stat. 302. It provides that if the taxpayer has on or before June 15, 1925, filed a waiver of his right to have the tax due for the taxable year 1919 determined and assessed within five years after the return was filed, then refund relating to such tax shall be made if claim therefor is filed on or before April 1, 1926. The section is a part of a tax law giving to taxpayers opportunity to secure refund of overpayments that had become barred. Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide. *United States* v. *Merriam*, 263 U. S. 179, 187. *Bowers* v. *N. Y. & Albany Co., supra*, 350. *United States* v. *Updike*, 281 U. S. 489, 496. *United States* v. *Michel*, 282 U. S. —.

Plaintiff filed its waiver within time and, in consideration of that, it admittedly secured the right to claim the refund. But it did not within the specified time formally make a claim for it. The Government's point comes down to the question whether the waiver and the letter transmitting it together with what went before

amounted to the filing of a claim within the meaning of the statute.

The Commissioner prior to that amendment had finally determined that in 1919 plaintiff had overpaid its tax by $10,866.43. That finding was made upon a consideration of the plaintiff's tax return, its claim for abatement of the jeopardy assessment and presumably all material details of its business in the taxable year. The schedule contained in the audit letter of November 19, 1924, showed the manner in which the bureau had computed the tax. And the refund of the ascertained overpayment was withheld by the Commissioner solely because of plaintiff's lack of compliance with § 281 as it then stood.

The letter of May 16, 1925, sent soon after § 281 was amended, unmistakably referred to the overpayment that the Commissioner had found and reported. That an allowance of credit or refund was immediately intended is shown by the statement that it could not then be allowed unless waiver was filed as provided by the 1925 amendment. Plaintiff's prompt execution and return of the waiver and the bureau's acceptance of it clearly show that both considered the facts already found and reported a sufficient basis for plaintiff's claim. That such was the view of the Commissioner is fully confirmed by the notations made on the letter transmitting the waiver and upon the office record of the certificate.

The question here is to be distinguished from that which would have arisen if, contrary to the taxpayer's insistence, the Commissioner had held that what was done did not constitute a filing of a claim. No statute provides for review of the Commissioner's determinations in favor of taxpayers when made within the scope of his authority. Such rulings are entitled to much weight. In this case he had already found that in 1919 plaintiff had overpaid its tax in the amount stated. He needed no additional information to enable him to determine whether credit or refund should then be made. There is no suggestion that the allowance was induced by or resulted from fraud or mistake. The facts found disclose that there was a reasonable or substantial compliance with the amendment. The Commissioner within the time allowed was advised of the grounds on which plaintiff's right to refund rested, and was not misled or deceived by plaintiff's failure to file formal claim and was fully warranted in holding that the waiver and earlier documents were sufficient. *Tucker* v. *Alexander*, 275 U. S. 228, 231.

The Government further contends that, even if the Commissioner's allowance was authorized, this suit is barred by R. S., § 3226, as amended. 26 U. S. C., § 156.[3] It provides that no suit for the recovery of any internal revenue tax alleged to have been erroneously collected shall be begun after five years from the payment of such tax. The overpayment made was more than five years before the complaint was filed. This case is not within the clause giving two years after disallowance because here the claim was allowed. Plaintiff pleads its claim in two forms. The first is based upon the issue and delivery of the Commissioner's certificate showing plaintiff entitled to a refund in the amount specified. The second alleges an account stated showing that there is due plaintiff the amount claimed. The action is not for the overpayment of the tax in 1919 but is grounded upon the determination evidenced by the certificate issued by the Commissioner May 12, 1927. Upon delivery of the certificate to plaintiff, there arose the cause of action on which this suit was brought. *United States* v. *Kaufman*, 96 U. S. 567, 570. *United States* v. *Savings Bank*, 104 U. S. 728. *Bank of Greencastle's Case*, 15 C. Cls. 25. There is no merit in the contention that the suit is barred.

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[3] "No suit . . . for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . shall be begun . . . . after the expiration of five years from the date of the payment of such tax . . . unless such suit . . . is begun within two years after the disallowance of the part of such claim to which such suit . . . relates. . . ."